Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, *et al.*,
Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Environmental Policy Act requires a federal agency to prepare an Environmental Impact Statement (EIS) before undertaking a major action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The U.S. Department of Housing and Urban Development did not prepare an EIS before approving the transfer of federal land and expenditure of millions of dollars so that a private developer could build a big-box retail store and other large, multi-story buildings in the southern portion of the Lower Garden District. The Lower Garden District is part of historic New Orleans and is listed on the National Register of Historic Places because it retains its mid-Nineteenth Century appearance.

The question presented is:

Whether, as the First, Second, Ninth, Eleventh, and D.C. Circuits have held, an agency must prepare an Environmental Impact Statement whenever a major federal action is likely to significantly affect the quality of the human environment or whether, as the Third, Fifth, and Tenth Circuits have held, an agency need not prepare an Environmental Impact Statement unless a major federal action will certainly significantly affect the quality of the human environment.

PARTIES TO THE PROCEEDING

Coliseum Square Association, Inc.; Smart Growth for Louisiana; Louisiana Landmarks Society, Inc.; Historic Magazine Row Association; and The Urban Conservancy, Inc. are petitioners in this Court, were appellants in the court of appeals, and were plaintiffs in the district court.

Alphonso Jackson, Secretary of Housing and Urban Development, is a respondent in this Court, was an appellee in the court of appeals, and was a defendant in the district court.

The Housing Authority of New Orleans is a respondent in this Court, was an appellee in the court of appeals, and was an intervening defendant in the district court.

RULE 29.6 DISCLOSURE

Coliseum Square Association, Inc. has no parent or publicly held company owning 10% or more of its stock.

Smart Growth for Louisiana has no parent or publicly held company owning 10% or more of its stock.

Louisiana Landmarks Society, Inc. has no parent or publicly held company owning 10% or more of its stock.

Historic Magazine Row Association has no parent or publicly held company owning 10% or more of its stock.

The Urban Conservancy, Inc. has no parent or publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

DECISIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS 1

STATEMENT OF THE CASE 1

A. Statutory Background 1

B. Factual Background 3

C. Agency And District Court Proceedings 5

D. The Fifth Circuit's Decision 6

REASONS FOR GRANTING THE PETITION 10

I. THE DECISION OF THE COURT BELOW EXACERBATED A LONGSTANDING CONFLICT IN THE COURTS OF APPEALS REGARDING WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS 11

TABLE OF CONTENTS
(continued)

Page(s)

A. The First, Second, Ninth, Eleventh, And D.C. Circuits Apply A Less Deferential "Substantial Possibility" Standard.....13

B. The Third, Fifth, And Tenth Circuits Apply A Highly Deferential Standard, Obliging The Challenger To Show That The Major Federal Action "Would Cause" A Significant Impact.....16

II. WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS IS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT THIS COURT MUST RESOLVE.....18

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT.....20

A. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Compatibility Issue.....20

TABLE OF CONTENTS
(continued)

Page(s)

B. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Collateral Effects Issue.....22

C. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The National Historic Landmarks Issue 23

CONCLUSION.....25

TABLE OF AUTHORITIES

Page(s)

CASES

Anacostia Watershed Soc'y v. Babbitt,
871 F. Supp. 471 (D.D.C. 1994) 24

Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n,
449 F.2d 1109 (D.C. Cir. 1971) 24

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 12

City of Shoreacres v. Waterworth,
420 F.3d 440 (5th Cir. 2005) 23

City of Waltham v. U.S. Postal Serv.,
11 F.3d 235 (1st Cir. 1993) 10, 13

Dep't of Transp. v. Pub. Citizen,
541 U.S. 752 (2004) 3, 18

Fritiofson v. Alexander,
772 F.2d 1225 (5th Cir. 1985) 19

Gee v. Boyd,
471 U.S. 1058 (1985) 10, 12

Grand Canyon Trust v. FAA,
290 F.3d 339 (D.C. Cir. 2002) 15

Greater Yellowstone Coalition v. Flowers,
359 F.3d 1257 (10th Cir. 2004) 10, 17, 18

Greenpeace Action v. Franklin,
14 F.3d 1324 (9th Cir. 1992) 15

Hill v. Boy,
144 F.3d 1446 (11th Cir. 1998) 10, 15, 17

Idaho Sporting Cong. v. Thomas,
137 F.3d 1146 (9th Cir. 1998) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Idaho v. ICC,
35 F.3d 585 (D.C. Cir. 1994) 24

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 11, 12, 19

Md.-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv.,
487 F.2d 1029 (D.C. Cir. 1973) 22

National Audubon Soc'y v. Hoffman,
132 F.3d 7 (2d Cir. 1997) 10, 13

Ocean Advocates v. Army Corps of Eng'rs,
402 F.3d 846 (9th Cir. 2004) 10, 14, 15

Preserving Endangered Areas of Cobb's History v. Army Corps of Eng'rs,
87 F.3d 1242 (11th Cir. 1996) 20

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 1, 23

Sabine River Auth. v. Dep't of Interior,
951 F.2d 669 (5th Cir. 1992) 10, 19

Sierra Club v. Marsh,
769 F.2d 868 (1st Cir. 1985) 13, 21, 22

Sierra Club v. Peterson,
717 F.2d 1409 (D.C. Cir. 1983) 10, 15, 16

Soc'y Hill Towers Owners' Ass'n v. Rendell,
210 F.3d 168 (3d Cir. 2000) 10, 17

The Steamboaters v. FERC,
759 F.2d 1382 (9th Cir. 1984) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

5 U.S.C. § 706 12
28 U.S.C. § 1254 1
42 U.S.C. § 4321 1
42 U.S.C. § 4332 ..... 2, 18

FEDERAL REGULATIONS

40 C.F.R. § 1500.3 2
40 C.F.R. § 1501.4 ..... 2, 3
40 C.F.R. § 1508.9 2
40 C.F.R. § 1508.13 3
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Lower Garden District – Information, http://www.nr.nps.gov/nrname1.htm 4

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Daniel R. Mandelker, *NEPA Law and Policy* (2d ed. 2006) 12

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Stacy Mitchell, *Big Box Swindle* (2006) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 465 F.3d 215 and is reprinted in the Appendix to the Petition (App.) at 1a. The relevant opinions of the United States District Court for the Eastern District of Louisiana are reprinted at App. 52a and App. 68a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on September 18, 2006. The court of appeals denied petitioners' timely rehearing petition on December 13, 2006. (App. 79a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provisions and regulations are set forth in the Appendix at 82a-88a.

STATEMENT OF THE CASE

A. Statutory Background

Signed into law on January 1, 1970, the National Environmental Policy Act (NEPA) establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather, NEPA imposes procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. *See id.* at 349-50.

At the heart of NEPA is a requirement that federal agencies prepare a "detailed statement" – known as an Environment Impact Statement (EIS) – for "major Federal actions sig-

nificantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must consider five things:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. In short, NEPA provides criteria to guide an agency's consideration of the environmental tradeoffs involved in major federal actions.

The Council of Environmental Quality (CEQ) was established by NEPA with authority to issue regulations interpreting that statute. CEQ has promulgated regulations to guide federal agencies in determining what actions are subject to the statutory requirement to prepare an EIS. *See* 40 C.F.R. § 1500.3. The CEQ regulations allow an agency to prepare a more limited document, an Environmental Assessment (EA), when the action will not significantly affect the human environment. *See id.* §§ 1501.4(a)-(b). An EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." *Id.* § 1508.9(a). CEQ regulations require an agency preparing an EA to consider "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources." *Id.* § 1508.27(b)(3). If, after preparing an EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a "finding of no significant impact" (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human

environment. *See id.* §§ 1501.4(e), 1508.13. *See generally Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-58 (2004).

B. Factual Background

This case involves a well-intentioned, necessary urban public renewal plan, for an historic area of New Orleans, that was hijacked to serve the interests of a developer and a big-box retailer looking for land in an urban area. *See* Stacy Mitchell, *Big Box Swindle* 15 (2006) ("In the heart of historic New Orleans, the demolition of a public-housing complex provided sufficient acreage for Wal-Mart to build a two-hundred-thousand-square-foot Supercenter surrounded by an ocean of parking.").

The historic area of concern here is the Lower Garden District. (*See* App. I) The district is adjacent to downtown New Orleans, the National Historic Landmark Garden District, and the Mississippi River. In the early Nineteenth Century, two plantation owners asked Bartheleme Lafon to draw up plans for subdividing their property. Lafon planed a community with basins, fountains, tree-lined canals, market places, and parks. By the time of the Civil War, the Lower Garden District included many grand houses encircling a central park that Lafon had named Coliseum Place. During the Depression, a housing project – the St. Thomas Housing Development (St. Thomas) – was built in the southern portion of the Lower Garden District. In keeping with the pedestrian scale of the historic neighborhood, St. Thomas originally included 970 units in two- and three-story solid masonry brick buildings arranged around outdoor spaces. In 1952, 540 more housing units were added. The ensuing decades exacted a toll on St. Thomas and, by the early 1990s, the public housing development was decaying, outdated, and dangerous.[1]

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[1] *See generally* History of the Lower Garden District, http://www.coliseumsquare.org/lower_garden_district_pages/history.html.

In 1996, respondent Department of Housing and Urban Development (HUD) granted respondent Housing Authority of New Orleans (HANO) $25 million through the HOPE VI program for the revitalization of St. Thomas. The original plan proposed fifty percent public housing, thirty percent low-income housing, and twenty percent market-rate housing. There was no planned retail. This proposal had broad-based support, including the support of petitioners here.

In 2000, the character of the proposed revitalization changed dramatically. At the urging of a private developer (Historic Restorations Inc. (HRI)), HANO proposed including as part of the urban project a 275,000 square-foot retail center with an 850-space parking lot, a fourteen-story market-rate housing condominium, a thirteen-story continuing care facility, and other small scale commercial ventures.[2] HUD waived income eligibility regulations for the project, so that it would now include very little low-income housing. After the size of the Wal-Mart Supercenter was reduced to 200,000 square feet, HUD approved the revised plan. HUD did not prepare an EIS. (App. 8a.)

Because the Lower Garden District reflects and retains its mid-Nineteenth Century appearance, the area is listed on the National Register of Historic Places.[3] The center of commer-

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[2] Specifically, "the proposed undertaking" included "[n]ew construction of Riverview Continuing Care Retirement Center, consisting of approximately 312 units in one 13-story structure covering one city block with structured parking"; "[n]ew construction of residential condominiums that consist of one 14-story structure of approximately 100 units with structured parking"; and "new construction of Riverview Retail Development of approximately 199,000 square feet, with surface parking for 825 automobiles" "to be occupied by a Super Wal-Mart." (App. 96a.)

[3] As described by the National Park Service, the Lower Garden District is

> characterized by contrasting land uses and a variety of building types and styles including Greek Revival and those of the Victorian era[;] notable are Coliseum Square with its park, surrounding grand dwell-

cial activity in the Lower Garden District offers "an array of coffeehouses, antique stores, restaurants, and light commercial businesses." (Environmental Assessment and Compliance Findings for the Related Laws (hereinafter "HUD EA") at 0003 (on file in the Clerk's Office).)

C. Agency And District Court Proceedings

Petitioners are not-for-profit organizations representing businesses and people that share an interest in the cultural, historic, and socioeconomic vitality of New Orleans.

In July 2002, petitioners filed suit in the Eastern District of Louisiana. Among other things, petitioners sought an injunction compelling HUD to withhold HOPE VI funds until HUD prepared an EIS for the St. Thomas Project. HUD then agreed to reconsider whether to prepare an EIS and restricted work on the project to residential infrastructure work and environmental remediation. In February 2003, HUD again decided that it did not need to prepare an EIS. (*See* HUD EA.) Among other conclusions, HUD found that (1) the project was "compatible with the surrounding development," (2) there were no cumulative effects (other than traffic) that needed to be considered, and (3) no National Historic Landmarks were affected by the project. (HUD EA at 001-005.) The district court denied petitioners' request for a temporary restraining order. In considering HUD's failure to prepare an EIS, the district court applied a "highly deferential standard of review," one with the "least latitude in finding grounds for reversal." (App. 74a.) In a single conclusory paragraph, the district court applied this

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ings and the 19th C. scheme of canals and fountains and the Magazine St. commercial structures, many with 1- and 2- story verandas.

See Lower Garden District – Information, http://www.nr.nps.gov/nrname1.htm (follow "State and Resource Name" hyperlink; then enter "LA" into the "state code" box and "Lower Garden District" into "name" box and follow "Execute" hyperlink; then follow "WEB PAGE" hyperlink).

highly deferential standard and approved HUD's decision not to prepare an EIS. (App. 74a-75a.)

D. The Fifth Circuit's Decision

Petitioners appealed to the Fifth Circuit.[4] The court noted that "[i]t is undisputed that HUD's funding of the project is a major federal action" so that NEPA applies. (App. 12a.) Thus, the question before the court of appeals was "whether HUD acted reasonably and in accordance with law in deciding, based on its EA and FONSI, that its action had no direct or indirect effects that significantly affected the quality of the human environment," and thus no EIS was necessary. (*Id.*) Importantly, the court did not seriously dispute that the project was *likely* to significantly affect the quality of the human environment. Nevertheless, the court of appeals permitted HUD to continue to spend federal funds on the project without preparing an EIS.

The court of appeals upheld HUD's decision not to prepare an EIS – despite the project's likely significant impacts on the environment – by applying a standard of judicial review that permits agencies to avoid the EIS process unless the significant impacts will *definitely* come to pass. The court posed the legal question as whether "HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project *would* significantly affect the

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[4] At the outset, the court of appeals rejected respondents' argument that completion of the Wal-Mart portion of the projected rendered this case moot. The court observed that "[t]he following construction was planned but not yet begun: 200 mixed-income rental units, 64 affordable rental housing units for the elderly, a 250-unit market-rate rental retirement community, and 200 market-rate condominium units; additional small-scale commercial ventures, which may be included in some of the new residential construction; and construction or rehabilitation of affordable rental housing (90 units) and affordable individually owned houses (50 units)." (App. 10a.)

quality of the human environment." (App. 17a (emphasis added).) By asking whether the project "would" affect the quality of the human environment, the Fifth Circuit applied a standard of judicial review that is exceptionally deferential to the agency.

By using that standard, the court of appeals was able to sanction HUD's decision not to prepare an EIS despite the likely impact of the Wal-Mart project on the character of the historic Lower Garden District. Many opponents of the project predicted that the project would seriously erode the historic, pedestrian-focused character of the neighborhood.[5] Approving a Wal-Mart Supercenter in historic New Orleans required massive changes in zoning laws. (*See, e.g.*, App. 90a (April 11, 2002 draft study of Lambert Advisory LC) (noting "Wal-Mart's insistence with maintaining a parking lot sized beyond what the City zoning code allows").) The zoning changes were necessary, of course, not because the project called for land use consistent with the status quo, but because it called for a material change: the demolition of the existing affordable residential housing (and the displacement of the community that it supported), in favor of a 200,000 square-foot Wal-Mart Supercenter with associated massive parking requirements; a market-rate retirement community; and high-rise, market-rate apartments.

The private developer – pointing to certain design features, such as the partial use of "bricks" (concrete masonry blocks) – suggested that the big-box store and other high-rise buildings would fit right into the Lower Garden District's mid-Nineteen Century style. In justifying the decision not to prepare an EIS, HUD stated only that the project was "compatible with the surrounding development" and "complied with local zoning ordi-

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[5] As one architect asked, "[w]here is the argument that there are other parking lots of that size [850 spaces] in this neighborhood or anywhere in uptown New Orleans[?]" (App. 90a.)

nances," without explaining how it was compatible or noting that zoning changes were necessary to accommodate the project. (HUD EA 001, 002, 003, 005.) In upholding HUD's conclusion that the future consequences of the Wal-Mart Supercenter would not significantly affect the quality of the Lower Garden District neighborhood, the court of appeals emphasized that the proposed store would be "located on the Tchoupitoulas industrial corridor." (App. 21a.) Even HUD admitted, however, that the Project's area of potential effects was not limited to the Tchoupitoulas corridor, but extended across the rest of the Lower Garden District, and most of urban New Orleans. (*See* App. I.) The court, however, concluded that petitioners had not established that the consequences of the Wal-Mart Supercenter would *necessarily* have a significant effect on the quality of the neighborhood, and it thus approved HUD's determination. (*See* App. 20a-21a.)

Similarly, the court of appeals approved HUD's decision not to prepare an EIS even though it was likely that a significant impact on the environment would be caused by other retailers following Wal-Mart into the Lower Garden District. HUD's administrative record contained an economic study showing that the Project, as conceived, would likely lead to a rush of other national chain stores. *See* Appellants' Fifth Circuit Record Excerpt 8, at 1; *id.* at 39 ("it is understandable that local businesses and residents view Wal-Mart as the first wave of the national retailers"). Despite this evidence, HUD never considered the possible effects that a larger migration of businesses might have on the Lower Garden District. In approving HUD's decision, the court declared that this "statistical data discussing general national trends" was "speculative" because there was "nothing concrete" to show that an influx of national chain retailers *will* occur. (*See* App. 29a.)

So too, the court was able to excuse HUD's failure to perform an EIS despite the project's potential impact on historic properties only by suggesting that the impact on the properties was not certain. As the map reproduced in the appendix con-

veys, the project threatened to affect many historic sites, including sixty-eight properties listed on the National Register of Historic Places, twelve National Register Districts, two National Historic Landmark (NHL) properties, and two NHL Districts (the Garden District and the Vieux Carre, more commonly known as the French Quarter). (*See* App. I.) The record is unequivocal that HUD relied exclusively on the opinions of the National Park Service (NPS) in concluding that the Project would not significantly affect any Landmarks. (*See* App. 34a, 38a-40a; HUD EA at 0005.) NPS, however, had not actually come to that conclusion. It informed HUD that "our files contain *insufficient information* to allow us to clarify the [no-impact] position stated previously by this office," and that "we cannot clarify the reasoning for the previous NPS decision." (App. 92a (emphasis added).) Recognizing the potentially significant impact on NHLs, NPS noted that "the National Historic Landmarks are considered to be the most important historic landmarks in the United States. They are national treasures worthy of extra caution." (*Id.*)[6] In affirming HUD's finding, the court of appeals stated that petitioners had not proven that "HUD was . . . arbitrary and capricious in relying on the National Park Service's [inscrutable] determination as support for its conclusion that the project would have no significant impact." (*See* App. 40a.)

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[6] The NPS employee who had surveyed the area and prepared the NPS opinion letters left the NPS between the time he sent the letters and the time HUD reopened the matter, and was thus unable to provide the basis for his opinions. (App. 93a.) Accordingly, the NPS asked HUD to delay the approval process "to provide [the NPS] time to respond adequately on the project's impacts on the National Historic Landmarks." *Id.* Less than a month later, however, the NPS sent HUD a letter withdrawing the request for more time. Rather than providing with any basis or rationale for its earlier no-impact finding, it provided only reasons for allowing HUD to proceed: that "HUD . . . appropriately sought NPS' comments and relied on those comments in good faith." (*Id.* at 94a.)

REASONS FOR GRANTING THE PETITION

There is a longstanding and pervasive circuit disagreement on the standard of review applicable to a federal agency's decision not to prepare an Environmental Impact Statement. An agency considering a project in Colorado or Texas is free to ignore possible but uncertain effects when deciding whether to prepare an EIS.[7] The same agency considering an identical project in Connecticut, Nevada, or Maine must consider all of the likely significant effects of the project in determining whether to prepare an EIS.[8] Thus, once again, "[t]he lower courts [are] in disarray on what standard of review to apply to an agency's decision not to undertake an EIS." *Gee v. Boyd*, 471 U.S. 1058, 1059-60 (1985) (White, J., joined by Brennan and Marshall, J.J., dissenting from denial of petition for writ of certiorari) (citations omitted).

The question of the proper standard for judicial review of an agency decision not to prepare an EIS is exceptionally important. NEPA applies to every federal agency, and the decision to issue an EIS – or not – is at the statute's core. Thus, the standard by which a court reviews that decision vastly impacts the process of federal environmental decisionmaking. Because consideration of environmental risk goes to the heart of the structured environmental assessment mandated by NEPA, those circuits that allow an agency to sidestep the EIS process merely because a future impact is uncertain seriously impede the goals of the statute. Moreover, those circuits that

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[7] *City of Waltham v. U.S. Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997); *Ocean Advocates v. Army Corps of Engineers*, 402 F.3d 846, 865-67 (9th Cir. 2004); *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998); *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

[8] *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004).

are sidestepping NEPA are doing so by claiming support from this Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The Court has a special obligation to clarify the law where circuit courts are misinterpreting prior decisions of the Court.

Not only is the circuit split longstanding and the issue exceptionally important, but this is an ideal case for the Court to bring clarity to the issue. In this case, HUD explained its failure to prepare an EIS by stating that the project was compatible with the existing neighborhood, that no other retailers were likely to follow the big-box retailer, and that the National Park Service had found no harm to nearby historic landmarks. In truth, the 200,000 square foot concrete-masonry block building – a building requiring massive changes in local zoning laws – bears little resemblance to the rest of the mixed-use historic district; economic evidence strongly suggested other retailers would follow the Project; and the National Park Service told HUD it could not discern any basis for its no-harm-to-landmarks finding. The only rationale a court of appeals could possibly use to approve HUD's decision not to prepare an EIS is that the court could not be certain that the project "would" significantly affect the quality of the human environment. Thus, the issue of whether an agency must prepare an EIS where a major federal project may have significant effects on the quality of the human environment is squarely presented for the Court.

I. THE DECISION OF THE COURT BELOW EXACERBATED A LONGSTANDING CONFLICT IN THE COURTS OF APPEALS REGARDING WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS

Courts have long struggled with identifying the appropriate standard of judicial review for agency decisions not to prepare an EIS. More than two decades ago, Justice White urged this Court to grant review and bring order to the then-existing state

of chaos among the circuits regarding the appropriate standard of review of an agency's decision not to prepare an EIS under NEPA. *Gee*, 471 U.S. at 1059-60.[9] Shortly thereafter, this Court's unanimous opinion in *Marsh* attempted to clarify the standard for reviewing an agency's decision not to prepare an EIS.

In *Marsh*, this Court held that such a decision is reviewed under the "arbitrary and capricious" standard articulated in the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). *See* 490 U.S. at 377. In so doing, the Court reaffirmed its longstanding doctrine that the reviewing court "must consider whether" the agency's decision not to prepare an EIS "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[10] *Id.* Although "the ultimate standard of review is a narrow one," the inquiry must be "searching and careful." *Id.* at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

Eighteen years after *Marsh*, the courts of appeals are again in disarray on the proper standard of review to apply to an agency decision not to prepare an EIS. Consistent with the clear intent of *Marsh*, some circuits apply a "searching and careful" form of arbitrary and capricious review. Other circuits, however, have erroneously relied on *Marsh* to sanction

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[9] Justice White explained: "The First, Second, and Seventh Circuits, like the Fourth, will reverse such agency action only if it is arbitrary or capricious. Four other Circuits have employed a "reasonableness" standard of review. The Third Circuit has assumed, without deciding, that a "reasonableness" standard is appropriate, and the Sixth Circuit has similarly declined to choose between the two standards. The Court of Appeals for the District of Columbia Circuit has developed a four-part test to determine whether the agency action is arbitrary and capricious. . . ." *Gee*, 471 U.S. at 1059.

[10] Although *Marsh* concerned the decision of an agency not to prepare a supplemental EIS, *Marsh* also applies to an agency's decision not to prepare an EIS in the first instance. *See* Daniel R. Mandelker, *NEPA Law and Policy* § 8:7 (2d. ed. 2006).

agency review that is so deferential as to be practically non-existent. In particular, several circuits, including the Fifth Circuit below, have distorted *Marsh* to stand for the proposition that a court will not disturb an agency's refusal to prepare an EIS unless the significant impacts would necessarily occur. *See generally* Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There are Too Many Trees*, 17 Tul. Envtl. L.J. 177 (2003) (discussing the conflict among the courts of appeals regarding appropriate standard of review under *Marsh*).

A. The First, Second, Ninth, Eleventh, And D.C. Circuits Apply A Less Deferential "Substantial Possibility" Standard

The First, Second, Ninth, Eleventh, and D.C. Circuits review an agency's decision not to prepare an EIS under a "substantial possibility" standard that assures the agency has conducted a thorough examination into a project's *potential* effects before determining that no EIS is needed.

The First Circuit reviews an agency determination not to prepare an EIS for whether it shows "a 'substantial *possibility*' that the project '*could* significantly affect the quality of the human environment.'" *City of Waltham v. U.S. Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 870-71 (1st Cir. 1985) (Breyer, J.)) (emphasis added). The First Circuit will reverse an agency's decision not to prepare an EIS unless the agency has adequately considered all substantially probable effects of its project. *See, e.g.*, *Sierra Club*, 769 F.2d at 877 (refusing to uphold agency's decision not to issue EIS where agency failed "to consider adequately the fact that building a port and causeway *may* lead to the further industrial development").

Like the First Circuit, the Second Circuit asks whether an agency considered the "possibility" of significant impacts. For example, in *National Audubon Society v. Hoffman*, 132 F.3d 7,

18 (2d Cir. 1997), the Second Circuit reversed a decision by the National Forest Service not to prepare an EIS. *Id.* Because the Forest Service had failed to consider the *possible* effects of the challenged action, the court concluded that its "determination that preparation of an EIS was not necessary, based on the record before it, was . . . arbitrary and capricious." *Id.* Thus, under the Second Circuit's approach, "NEPA's policy goals require agencies to err in favor of preparation of an EIS when the proposed action is *likely* to have a significant environmental impact," and "a party challenging the agency's decision not to prepare an EIS must [thus] show only that there is a *substantial possibility* that the action may have a significant impact on the environment." 132 F.3d at 18 (emphasis added). The Second Circuit expressly rejects the view (adopted by the Fifth Circuit here) that the challenger must demonstrate that the significant impact will occur. *Id.* ("*not* that it clearly will have such an impact" (emphasis added)).

Similarly, the Ninth Circuit requires federal agencies to inquire into "potential" effects before declining to prepare an EIS. For example, in *Ocean Advocates v. Army Corps of Engineers*, the Army Corps had relied upon "a letter from BP [the refinery operator] stating that only market forces, and not the additional pier [the construction of which required Corps approval], would increase total vessel traffic." 402 F.3d 846, 865-67 (9th Cir. 2004). But because the Corps "failed to demonstrate . . . that it critically evaluated the *potential* increase in tanker traffic from the dock extension alone," the court reversed the Corps' decision, notwithstanding the lack of any concrete evidence proffered by the challengers that the dock addition would in fact increase tanker traffic. *Id.* at 867 (emphasis added). In so doing, the court explained that an "EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor." *Id.* at 864-65 (internal quotation marks and alterations omitted); *accord Idaho Sporting*

Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). Like the Second Circuit, the Ninth Circuit has expressly rejected the contrary view: "To trigger this [EIS] requirement a plaintiff need not show that significant effects *will in fact occur*," "raising substantial questions whether a project *may* have a significant effect is sufficient." *Ocean Advocates*, 402 F.3d at 866 (internal quotation marks and alteration omitted).

So too, the Eleventh Circuit has refused to permit an agency to avoid preparing an EIS merely because there is only the "potential" of a significant effect on the quality of the human environment. In *Hill v. Boy*, the Army Corps of Engineers chose not to create an EIS in connection with the issuance of dredge-and-fill permits needed for the construction of a dam and reservoir, the site of which was crossed by an existing underground petroleum pipeline. 144 F.3d 1446 (11th Cir. 1998). The court of appeals reversed due to the corps' failure to "take a 'hard look' at the *potential* adverse environmental consequences of such a pipeline," as the Corps had ignored the possibility that the existing pipeline might leak oil into the reservoir, and instead assumed that the pipeline would be relocated before the dam was built, without procuring any agreement to that effect. *Id.* at 1451.

The D.C. Circuit also requires agencies to consider possible (but not certain) effects. The court requires an agency to prepare an EIS "[i]f *any* significant environmental impacts *might* result from the proposed agency action." *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (*Peterson*) (McKinnen, J., joined by Wright and Scalia, J.J.) (second emphasis added); *see also Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002). In *Peterson*, the United States Forest Service decided not to issue an EIS with respect to an oil and gas leasing program. The D.C. Circuit reversed: "NEPA requires that federal agencies determine at the outset whether their major actions *can* result in 'significant' environmental impacts." *Id.* at 1413-14 (emphasis added). The

court thus held that the Forest Service failed to comply with NEPA by foregoing the EIS process despite the potential effects of drilling on the non-highly sensitive lands. *See id.* at 1414-15.

In sum, the First, Second, Ninth, D.C., and Eleventh Circuits all require federal agencies to prepare an EIS where a major federal action may significantly affect the quality of the human environment, even if it cannot be shown that it certainly will.

B. The Third, Fifth, And Tenth Circuits Apply A Highly Deferential Standard, Obliging the Challenger To Show That The Major Federal Action "Would Cause" A Significant Impact

As illustrated by the decision below, some circuits are misinterpreting *Marsh* to require a highly deferential standard of review of an agency's decision to dispense with the EIS process. Under these courts' approach, an agency's decision not to prepare an EIS will be affirmed unless the challenger can show that the project will, in fact, cause significant effects on the human environment.

Thus, in this case, the Fifth Circuit excused HUD's failure to prepare an EIS by noting the slim chance that the events feared by petitioners might not in fact come to pass: placing a Wal-Mart Supercenter and other high-rise buildings in the Lower Garden District might not significantly alter the historic quality of the neighborhood; other national retailers might not follow Wal-Mart into the Lower Garden District; and the project might not significantly impact nearby National Historic Landmarks. (*See* App. 21a-22a, 29a, 40a.) Under the Fifth Circuit's view, a federal agency is free to ignore serious potential effects on the quality of the human environment because there is some modest chance that these feared events might not occur.

Like the Fifth Circuit, the Third Circuit permits an agency to avoid an EIS despite the existence of potentially significant

effects on the quality of the human environment. In *Society Hill Towers Owners' Ass'n v. Rendell*, HUD financed the construction of a hotel and parking complex in downtown Philadelphia without preparing an EIS. *See* 210 F.3d 168 (3d Cir. 2000). In reaching its decision that no EIS was needed, HUD never considered the cumulative effects that would result from building the hotel and parking complex in connection with other projects that had been proposed for the area, including the creation of a "mega" entertainment complex. *See id.* at 182. The court upheld HUD's decision to ignore those potential effects because it was "not at all *certain* that the proposed 'mega' entertainment complex or any of the projects included in the planning documents [would] ever be completed." *Id.* (emphasis added). Because the challengers could not establish that the proposed projects would in fact be built, the Third Circuit held that NEPA did not oblige HUD to consider the possibility of such construction before foregoing the EIS process altogether.

Like the Third and Fifth Circuits, the Tenth Circuit also permits agencies to avoid the EIS process even though a major federal action is likely to significantly affect the human environment. For example, in *Greater Yellowstone Coalition v. Flowers*, the court upheld the Army Corps of Engineers' decision not to prepare an EIS concerning construction of a 359-acre golf course and upscale housing development in the Snake River Canyon. *See* 359 F.3d 1257 (10th Cir. 2004). The site of the proposed construction (which was a wetland subject to the Corps' jurisdiction) contained an "intact and healthy riparian ecosystem" supporting bald eagle nesting territories in addition to moose, elk, mule deer, black bears, mountain lions, trumpeter swans, and Snake River cutthroat trout. *See id.* at 1263. Although the Corps recognized that the impact on the bald eagle nesting grounds left a "continuing potential for disturbance due to increased human activity in the area," it nonetheless dispensed entirely with the EIS process. *Id.* at 1276. In upholding the Corps' decision, the Tenth Cir-

cuit explained that the evidence before the Corps "could not predict with *certainty* how the resident bald eagles would react to the Canyon Club development." *Id* (emphasis added). The court thus affirmed the Corps' decision not to prepare an EIS because "the past behavior of eagle pairs cannot be used to predict the future behavior of these and other eagle pairs within the Snake Unit." *Id.* In other words, the very fact that it was impossible to determine whether the project would certainly cause a significant effect on the nesting eagles was sufficient to support the Corps' decision not to prepare an EIS.

In sum, the Third, Fifth, and Tenth Circuits only require federal agencies to prepare an EIS where a major federal action will definitely significantly affect the quality of the human environment.

II. WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS IS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT THIS COURT MUST RESOLVE

The deep circuit split is vitally important because resolution of the dispute will have significant consequences for the practice of environmental decisionmaking. And because much of the circuit disagreement turns on this Court's decision in *Marsh*, the Court has a special responsibility to clarify this area of the law.

The standard of review adopted by the Third, Fifth, and Tenth Circuits hands federal agencies *carte blanche* to ignore NEPA's core requirement. The requirement that an agency prepare a fully informed and reasoned EIS before undertaking any "major" action "significantly affecting the human environment" lies at the "heart" of NEPA. *See Pub. Citizen*, 541 U.S. at 757-58 (citing 42 U.S.C. § 4332(2)(C)). Thus, this Court has mandated that courts reviewing agency decisions to forego the EIS process "carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision

based on its evaluation of the significance – or lack of significance – of the [relevant] information." *Marsh*, 490 U.S. at 378. The environmental consequences of practically every federal action are uncertain because the future is not yet known. The standard applied by the Third, Fifth, and Tenth Circuits permits agencies to ignore the EIS requirement in essentially every case simply by pointing to some mere possibility of uncertain future consequences. Indeed, this highly deferential standard permits agencies to sidestep NEPA *precisely* where careful decisionmaking is needed – when the potential outcome is uncertain.

In contrast, the position of the First, Second, Ninth, D.C., and Eleventh Circuits comports with NEPA and *Marsh*. Under the approach adopted by those courts, doubt is resolved in favor of preparing an EIS. By assuring that agencies prepare an EIS whenever a major federal action is likely to significantly affect the human environment, these circuits assure that agencies undertake to evaluate the environmental tradeoffs when their actions put the quality of the environment at risk.

Notably, those courts of appeals who have adopted a standard at odds with NEPA's core requirement have often attributed their highly permissive standard to *Marsh*. For example, prior to *Marsh*, the Fifth Circuit reviewed an agency's decision not to prepare an EIS for reasonableness, a standard it described as "less deferential" and "more rigorous" than the "arbitrary and capricious" standard. *See Fritiofson v. Alexander*, 772 F.2d 1225, 1237-38 (5th Cir. 1985). Subsequently, however, the Fifth Circuit determined that this Court's *Marsh* decision "plainly emasculated" *Fritiofson* and similar decisions and set a standard of review far more deferential to the agency. *See Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992). Like the Fifth Circuit, the Third Circuit has interpreted *Marsh* as permitting an agency to avoid an EIS despite the existence of potentially significant effects on the quality of the human environment. *Soc'y Hill Towers*, 210 F.3d at 178-79 (3d Cir. 2000). Another circuit has displayed

confusion on the point,[11] while other circuits properly interpret *Marsh* as retaining the reasoned decisionmaking standard of review. Although *Marsh* plainly retains the reasoned decisionmaking requirement, the time has come for the Court to bring clarity to this area of the law.

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

This case squarely presents the standard-of-review issue for this Court's resolution. A federal agency has concluded that approving a Wal-Mart Supercenter (and the oceans of parking needed to support it), high-rise complexes, and other commercial ventures built in an historic, pedestrian-scale neighborhood of New Orleans (displacing hundreds of low-income families) does not trigger NEPA's EIS requirement, a requirement that applies to every major federal action that significantly affects the quality of the human environment. Such a strongly counterintuitive agency finding is only sustainable under a judicial standard that permits ignoring all but the most certain effects. The Fifth Circuit's decision below cannot stand if agencies are obliged to consider the likely effects of their actions.

A. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Compatibility Issue

Only under the Fifth Circuit's highly deferential standard of review is it possible to find that a proposed Wal-Mart with a block of parking and other high-rise buildings could be "compatible" with an historic neighborhood of pedestrian scale. As noted, many opponents of the project predicted that the Wal-Mart Supercenter would seriously erode the historic character

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[11] *Compare Hill*, 144 F.3d at 1451 (requiring agency to "make a convincing case"), *with Preserving Endangered Areas of Cobb's History v. Army Corps of Eng'rs*, 87 F.3d 1242, 1248-49 (11th Cir. 1996) (upholding decision not to create EIS where agency "considered the effects").

of the neighborhood while the private developer suggested that the big-box store would fit right in.[12]

In upholding HUD's conclusion that the future consequences of the Wal-Mart Supercenter would not significantly affect the quality of the Lower Garden District neighborhood, the court emphasized that the proposed Wal-Mart would be "located on the Tchoupitoulas industrial corridor." (App. 21a.) But even HUD admitted that the Project's area of potential effects extended across the rest of the Lower Garden District, and a large portion of urban New Orleans. (*See* App. I.) In the least, then, HUD was required to consider whether the proposed project would fit into the historic neighborhood of homes and pedestrian-scale retail, and not simply – as the court of appeals did – confine its inquiry to some adjacent industrial lands.

Any meaningful inquiry would surely have revealed the likelihood that this car-centered project focusing on a huge big-box suburban style store built largely out of concrete masonry block would almost certainly dramatically alter the character of this neighborhood. Only the most agency deferential standard imaginable – one that relies on even the merest suggestion that a likely event may not occur – could possibly sanction HUD's decision that the Wal-Mart Supercenter would be compatible with a Nineteenth-Century mixed-use neighborhood.

If this case had arisen in either the First, Second, Ninth, Eleventh, or D.C. Circuits, there is no question that HUD would have had to prepare an EIS. For example, in the First Circuit's decision *Sierra Club v. Marsh*, the court refused to defer to an agency's determination that no EIS was required

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[12] (*See, e.g.*, App. 90a ("Where is the argument that there are other parking lots of that size [850 spaces] in this neighborhood or anywhere in uptown New Orleans[?]"); *id.* (noting that the masonry-block exterior of the Wal-Mart Supercenter would constitute a drastic change from the brick veneers of the surrounding historic neighborhood).

where the agency had relied on compliance with local zoning laws without considering the fact that the relevant zoning laws had to be altered to effect compliance. *See Sierra Club v. Marsh*, 769 F.3d at 880-81. As in *Sierra Club v. Marsh*, major zoning changes were necessary here because the project called for land use inconsistent with the status quo. (*See* App. 20a-21a.) HUD's decision to avoid an EIS on these facts simply could not stand under *Sierra Club v. Marsh* and similar cases. *See, e.g., Md.-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973) ("When . . . the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny. NEPA has full vitality, and its policies cannot be taken as effectuated by local land use control, where the proposal of the Federal Government reflects a *distinctive difference in kind* from the types of land use, proposed by private and local government sponsors, that can fairly be taken as within the scope of local controls." (emphasis added)).

B. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Collateral Effects Issue

A second way in which this case turns on the applicable standard of review concerns whether the Wal-Mart Supercenter might attract other national chains to the vicinity of the St. Thomas Project. Petitioners pointed to an economic market assessment in the administrative record showing that the Project would likely be followed by a rush of other national chain stores. *See* Appellants' Fifth Circuit Record Excerpt 8, at 1, 39. In affirming HUD's decision to ignore that possibility, the Fifth Circuit emphasized that petitioners offered "nothing concrete" to show that specific additional projects are "planned for in this particular project area." (*See* App. 29a.) Short of an actual contract with new developers showing that an influx of national chain retailers *will* occur, however, it is unclear how any litigant is to show a significant possibility that such an in-

flux *might* occur, if not through such a focused economic study predicting that it would.

The cases relied on by the Fifth Circuit to suggest that the statistics were "speculative" do nothing of the sort. Both involve the standards for assessing whether a completed EIS is sufficient, rather than whether an agency must prepare an EIS in the first instance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) (upholding a CEQ regulation requiring EIS to include only "reasonably foreseeable" consequences); *City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005) (upholding agency decision not to include in EIS unlikely event that future dredging would be required).

Again, had this issue arisen in the First, Second, Ninth, Eleventh, or D.C. Circuits HUD would have had to prepared an EIS. An economic study showing that a major federal program might cause a significant impact on the human environment would trigger the EIS requirement in those circuits. Only under the exceptionally deferential standard employed by the Fifth Circuit and its aligned circuits could a court approve of HUD's decision not to prepare an EIS despite this economic evidence of significant potential consequences to the environment.

C. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The National Historic Landmarks Issue

A third illustration that this case turns on the applicable standard of judicial review concerns the real possibility of significant adverse impacts on National Historic Landmarks. The Fifth Circuit's highly deferential decision permitted HUD to rely on another agency's decision. HUD's only basis for its no-impact finding with respect to the NHLs was the NPS opinions, for which the NPS itself disavowed any identifiable basis, cautioning HUD that "extra caution" was required because "the National Historic Landmarks are considered to be the most important historic landmarks in the United States." (*See*

App. 92a.) Nonetheless, the Fifth Circuit approved the HUD's decision to not prepare an EIS, because petitioners had not made a sufficient showing that the Project would harm NHLs. (*See* App. 40a.) By contrast, the courts of appeals that impose a meaningful standard of review will not allow an agency to avoid preparing an EIS by merely deferring to other agencies and assuming that they will prevent significant effects from occurring. *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 1122-23 (D.C. Cir. 1971) (declaring that each agency must make an independent NEPA determination, and cannot merely defer to certification by separate agency that environmental standards are met).[13] In short, under the Fifth Circuit's approach, unless there was proof that NHLs *would* be harmed, HUD was free to ignore the possibility, and not prepare an EIS.

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[13] *See also, e.g., The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1984) ("One agency cannot rely on another's examination of environmental effects under NEPA"); *Idaho v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) ("Instead of taking its own hard look, the Commission deferred to the scrutiny of others by authorizing salvage subject to conditions that require Union Pacific to consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions. An agency cannot delegate its NEPA responsibilities in this manner . . . ."); *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 484 (D.D.C. 1994) (similar).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-30875

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION and the
URBAN CONSERVANCY, INC.,
Plaintiffs-Appellants,

v.

ALPHONSO JACKSON, ETC.; ET AL.,
Defendants,

ALPHONSO JACKSON, Acting Secretary,
U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT AND HOUSING AUTHORITY OF
NEW ORLEANS,
Defendants-Appellees,

No. 04-30522

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION and the
URBAN CONSERVANCY, INC.,
Plaintiffs-Appellants,

v.

HOUSING AUTHORITY OF NEW ORLEANS,
an agency of the State of Louisiana,
ALPHONSO JACKSON, Acting Secretary,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Defendants-Appellees,

v.

HISTORIC RESTORATION, INC.,
Intervenor-Appellee.

Sept. 18, 2006.
Rehearing Denied Dec 13, 2006.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before: JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this case, we are called upon to decide whether the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370f, and the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470f-470x-6, require the United States Department of Housing and Urban Development (HUD) to cease federal funding for the St. Thomas Housing Development revitalization project in the City of New Orleans until the agency completes further evaluation of the project's environmental and historic preservation impacts. Because it does not appear that HUD has acted arbitrarily, capriciously or contrary to law in its study, consideration, and findings regarding the project's environmental impacts, we conclude that these statutes impose no further requirements on HUD at this time.

I.

A brief overview of the statutes and regulations creating the administrative framework, terminology and objec-

tives helps to understand the case. After describing the bureaucratic order, we then turn to the factual and procedural background.

A.

1.

"NEPA establishes a 'national policy [to] encourage productive and enjoyable harmony between man and his environment,' and was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 756, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting 42 U.S.C. § 4321). " 'NEPA itself does not mandate particular results' in order to accomplish these ends." *Pub. Citizen,* 541 U.S. at 756, 124 S.Ct. 2204 (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). Instead, NEPA imposes procedural requirements on federal agencies, requiring agencies to analyze the environmental impact of their proposals and actions. *Pub. Citizen,* 541 U.S. at 756-57, 124 S.Ct. 2204. NEPA's central requirement is that federal agencies must:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of longterm productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2); *see also Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204.

Federal agencies receive guidance in their preparation of this detailed "Environmental Impact Statement", or "EIS", from the Council of Environmental Quality ("CEQ"). Established by NEPA with the authority to issue regulations interpreting that statute, the CEQ has promulgated regulations determining what actions are subject to that statutory requirement. *See* 40 C.F.R. § 1500.3; *see also Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204. According to these regulations, the agency may instead prepare a more limited document, called an Environmental Assessment ("EA"), if the proposed action is categorically excluded from the requirement to produce an EIS or does not clearly require the production of an EIS. *Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204 (citing 40 C.F.R. §§ 1501.4(a),(b)). An EA, as compared to an EIS, should be a "concise public document ... that serves to ... [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a). "If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a 'finding of no significant impact' (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204 (citing 40 C.F.R. §§ 1501.4(e), 1508.13).

2.

"The National Historic Preservation Act ('NHPA'), 16 U.S.C. §§ 470-470x-6, 'requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation ... to administer the Act.' " *Nat'l Mining Ass'n v. Fowler,* 324 F.3d 752, 755 (D.C.Cir.2003) (citations omitted). Section 106 of the NHPA requires that:

> [t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking ... shall, prior to the approval of the expenditure of any Federal funds ..., take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.
> 16 U.S.C. § 470f.

Like NEPA, the NHPA is procedural in nature. *See, e.g., Morris County Trust for Historic Pres. v. Pierce,* 714 F.2d 271, 278 (3d Cir.1983).

> It does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places. As such, courts have sometimes referred to Section 106 as a "stop, look, and listen" provision.

Business and Residents Alliance of East Harlem v. HUD, 430 F.3d 584, 591 (2d Cir.2005) (citing *Ill. Commerce Comm'n v. Interstate Commerce Comm'n,* 848 F.2d 1246, 1260-61 (D.C.Cir.1988); *Pres. Coal., Inc. v. Pierce,* 667 F.2d 851, 859 (9th Cir.1982)). Much like the EA/EIS process under NEPA, section 106 upholds the NHPA's objectives "neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them." *United States v. 162.20 Acres of Land,* 639 F.2d 299, 302 (5th Cir.1981).

When a project will adversely affect a National Historic Landmark, however, section 110f of the NHPA requires an agency to "undertake such planning and actions as may be necessary to minimize harm to such landmark" to the maximum extent possible and to allow the Advisory Council on Historic Preservation ("ACHP") time to comment. 16 U.S.C. § 470h-2(f). "Federal regulations also have been promulgated to guide the historic preservation review process, including consultation with the [State Historic Preservation Officer, or 'SHPO'] and an opportunity to comment by the [ACHP]." *Vieux Carre Property Owners Residents and Associates, Inc. v. Pierce,* 719 F.2d 1272, 1281 (5th Cir.1983) (citing to 36 C.F.R. §§ 800-100.13).

B.

1.

We now turn to the factual and procedural background of this case. The plaintiffs, Coliseum Square Ass'n, Inc., Smart Growth For Louisiana, Louisiana Landmarks Society, Inc., Historic Magazine Row Association, and The Urban Conservancy, non-profit organizations representing citizens, residents and merchants in the City of New Orleans ("plaintiffs"), brought this action against HUD for judicial review, seeking declaratory judgment that HUD failed to comply with NEPA and NHPA in funding the St. Thomas Housing Development revitalization project and an injunction compelling HUD to withhold federal funds from the project until it fully complies with those statutes. The Housing Authority of New Orleans ("HANO") was originally a named defendant. Although the district court granted plaintiffs' motion to dismiss HANO from the case as a defendant, HANO later re-entered the case as an intervenor.

The St. Thomas Housing Development revitalization project calls for substantial demolition of the pre-existing St. Thomas Housing Development (St.Thomas) in New Orleans and, in its place, the construction of new low-income hous-

ing, new market rate housing, a senior care facility, and a shopping center. Prior to the beginning of the project, St. Thomas was a residential public housing complex within the Lower Garden District of New Orleans. Both the Garden District itself and many of the buildings in St. Thomas are listed on the National Register for Historic Places. St. Thomas, built between 1937 and 1949, consisted of 121 buildings (a total of 1510 residential units) covering 64 acres. By 1994, St. Thomas had become excessively run-down and crime-ridden. The Housing Authority of New Orleans initiated renewal efforts, which resulted in a plan to renovate the area covered by St. Thomas.

In 1996, HUD granted the Housing Authority of New Orleans $25 million through the HOPE IV program for revitalizing St. Thomas; the project then did not contemplate retail stores but was limited to housing units. Because of its grant of federal funds, HUD became responsible for ensuring that its financing of the revitalization project complies with the requirements of NEPA and NHPA.

In 1998, HANO enlisted a private developer, Historic Restorations, Inc. ("Historic Restorations") to assist in improving the plan. An amended redevelopment plan, submitted to HUD in 2000, included construction of new low-income housing, new market rate housing, a senior care facility, and a 275,000 square foot shopping center, the last of which was to be built on nearby, formerly industrial land. Historic Restorations hired Citywide Testing ("Citywide") to prepare environmental studies and documents for the project. By November 4, 1999, Citywide had completed studies and proposed findings for HUD in support of a proposed FONSI.

By September 2000, HUD completed the initial Section 106 review required by the National Historic Preservation Act ("NHPA"), which examined the project's impact on historical properties. Subsequently, the Housing Authority

of New Orleans, the State Historical Preservation Officer, and the Advisory Council on Historic Preservation (a federal agency) signed a Memorandum of Agreement ("MOA") for the project. Demolition began in October 2000.

HUD also completed its NEPA review in May of 2001, after reviewing and adopting the proposed EA developed by Citywide and approved by HANO: after adopting the proposed EA/FONSI, HANO forwarded it to HUD. On May 21, 2001, the acting HUD officer noted, by hand and in the space provided, that HUD had reviewed and concurred in the proposed EA/FONSI.

In July 2001, after both the MOA and environmental assessment were completed, Historic Restorations recommended that the retail component of the project be scaled back from 275,000 square feet to 199,000 square feet and obtained a commitment from Wal-Mart to become the retailer.

On September 4, 2001, after HRI publicly announced that Wal-Mart would be filling the retail space, the State Historic Preservation Officer asked to reopen the NHPA review. On September 6, 2001, all parties to the MOA agreed to reopen the NHPA process. HUD then undertook additional study, including a particular focus on the potential impact Wal-Mart might have on historic properties in the area. The additional investigation included consultation with all of the MOA's signatories as well as with the City of New Orleans and its planning commission, the State of Louisiana, the general public (including St. Thomas residents), and the project's opponents (including neighborhood groups and preservation agencies). As a result of that study, HUD expanded its assessment of the project's Area of Potential Effects to cover parts of Uptown, Mid-City, and Faubourg Marigny as well as all of the Garden District, the Lower Garden District, Irish Channel, the Central Business District, and the Vieux Carre

(better known as the French Quarter).

In July 2002, two years after demolition had begun and the project's residents had been relocated, plaintiffs filed suit. In response to the concerns raised in that complaint, HUD reopened its NEPA process to conduct further study. While the process was open, progress on the project was restricted to infrastructure work on the residential sections and work needed to address environmental conditions. After the supplemental investigation was complete, the proposed EA and FONSI went through a public comment period. On February 20, 2003, an amended MOA was signed and a new environmental assessment and FONSI were issued.

2.

At oral argument we requested additional briefs from the parties regarding whether the case had been mooted because the project was either substantially complete or effectively terminated by the adverse effects of Hurricane Katrina. After reviewing those briefs, we are satisfied that this case is not moot and that we have subject matter jurisdiction.

It is true that many significant parts of the project have been completed. The Wal-Mart shopping center has been finished and open for business since late 2004. As of late February 2005, most of the former St. Thomas housing project had been demolished. Only five buildings were left standing for future rehabilitation. The first phase of housing units had been completed; 98% of them had been rented and occupied. Infrastructure work for the entire housing portion of the site had been completed, and work had begun on ten subsidized units of offsite rental housing.

The next phase, however, consisting of the construction of 73 mixed-income housing units, was expected to begin in March 2006. Work had not yet begun on rehabilitating the remaining five buildings from the St. Thomas hous-

ing project. The following construction was planned but not yet begun: 200 mixed-income rental units, 64 affordable rental housing units for the elderly, a 250- unit market rate rental retirement community, and 200 market rate condominium units; additional small-scale commercial ventures, which may be included in some of the new residential construction; and construction or rehabilitation of affordable rental housing (90 units) and affordable individually owned houses (50 units). Hurricane Katrina generally spared the existing housing units, and they are currently habitable. HANO indicates that it plans to finish the project, but it has not determined how Hurricane Katrina's impact might change the its prior plans.

The plaintiffs in the present case challenge far more than the building demolition called for by the project. Despite the completion of the Wal-Mart complex and other edifices, significant projected construction and renovation remain unfinished. Plaintiffs' requested relief--declaratory judgments invalidating the existing MOA as well as the environmental assessment and FONSI, plus injunctions halting construction and requiring preparation of a proper and legal MOA and environmental assessment--could, if granted, eliminate or alleviate a multitude of their expressed environmental and historical preservation concerns. Accordingly, we conclude that the case is not moot and proceed to consider the merits of the plaintiffs' claims. *Cf. Benavides v. Housing Authority of City of San Antonio, Tex.*, 238 F.3d 667, 670 (5th Cir.2001) (holding a demolition project to be moot where demolition was only 55% complete, but had progressed to the point where units were no longer habitable); *Bayou Liberty Ass'n v. U.S. Army Corps*, 217 F.3d 393 (5th Cir.2000) (holding the case to be moot where construction of the project had been entirely completed); *Vieux Carre Property Owners, Residents, & Assoc., Inc. v. Brown*, 948 F.2d 1436, 1446 (5th Cir.1991) ("as long as ... [the agency] has the ability to require changes that could con-

ceivably mitigate any adverse impact the project might have ... [the project] remains a federal undertaking and NHPA review is required."). None of the parties to this suit contend that Hurricane Katrina's effects have rendered the project moot.

II.

An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 375-376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Kleppe v. Sierra Club,* 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). Here, HUD based its FONSI upon the analysis contained within its EA; respondents argue that the issuance of the FONSI was arbitrary and capricious because the EA's analysis was flawed for numerous reasons that we address individually later in this opinion.[1]

Under NEPA, an agency is required to provide an EIS only if it will be undertaking a "major Federal actio[n]," which "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under applicable CEQ

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[1] On April 11, 2003, in ruling on cross-motions for summary judgment, the district court concluded that HUD's environmental assessment/FONSI and MOA were not "arbitrary and/or capricious in any respect." Plaintiffs contend that the district court erred in this ruling: that HUD arbitrarily and capriciously concluded that the project would result in no significant environmental impact.

Our review of the district court's ruling on the cross-motions for summary judgment is *de novo,* "applying the same standard on appeal that is applied by the district court." *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 877 (5th Cir.2002) (citing *Auguster v. Vermilion Parish Sch. Bd.,* 249 F.3d 400, 401 (5th Cir.2001)). Here, like the district court, we apply the "arbitrary and capricious" standard described above.

regulations, a "[m]ajor Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Effects" are defined to "include: (a) [d]irect effects, which are caused by the action and occur at the same time and place," and "(b) [i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." Id. § 1508.8. It is undisputed that HUD's funding of the project is a major federal action. Thus, we must determine whether HUD acted reasonably and in accordance with law in deciding, based on its EA and FONSI, that its action had no direct or indirect effects that significantly affected the quality of the human environment. See Pub. Citizen, 541 U.S. at 763-64, 124 S.Ct. 2204.

Plaintiffs first argue that HUD's action in funding the project was not in accord with law in two respects: they assert that federal regulations automatically required HUD to produce an EIS based on the increased level of noise and the sheer number of dwellings affected by the project. In their remaining arguments, plaintiffs contend that HUD acted arbitrarily and capriciously or unreasonably because the evidence available to HUD mandated preparation of an EIS.

A.

Plaintiffs contend that CEQ regulations required HUD to prepare an EIS under the facts established by its own EA, and that HUD's major federal action of funding the project before preparing an EIS was not in accordance with law. Contrary to plaintiffs' argument, however, HUD's interpretation and application of the regulations as permitting it to proceed without an EIS in this case were not arbitrary, capricious, or clearly contrary to law. When the interpretation and application of regulations by an agency and its opponents are not arbitrary and capricious nor clearly contrary to law we are required by NEPA and the Supreme Court's deci-

sions to accept the agency's decision as being in accordance with law. *See, e.g., N. Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15, 96 S.Ct. 172, 46 L.Ed.2d 156 (1975).

HUD regulation 24 C.F.R. § § 51.104(b)(2) requires the agency to prepare an EIS prior to approving "projects with unacceptable noise exposure[,]" that is, where sound levels reach 75 decibels or greater, based on a 24-hour weighted average of sound levels. *See* 24 C.F.R. § § 51.104(b)(2).[2] In its FONSI, HUD stated that the project is in compliance with noise abatement requirements, noting that the sound measurements fall within "acceptable" levels. In doing so, HUD relied on a September 2002 noise survey included in its EA which indicates that the noise exposure (the average day-night sound level at the site) reaches 60 decibels, within the "acceptable" range. Review of that study indicates that it used measurements taken over a 24-hour period within a carefully described area, and included an assessment of the possible effects of future increased traffic and the construction of retail buildings. Plaintiffs contend that in conducting the study HUD did not comply with its own September 1991 Noise Guidebook.

The fact that HUD's submitted study did not completely comply with the requirements of its Noise Guidebook is not, of itself, sufficient to show that its reliance on the study was not in accordance with law or arbitrary and capricious. In *Lyng v. Payne*, 476 U.S. 926, 937, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986), the Supreme Court held that "not all agency publications are of binding force"--in other words, the guidelines in question must be "the kind of agency law

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[2] HUD regulations define "Acceptable" noise levels as "not exceeding 65 dB[,]" "Normally Unacceptable" levels as "[a]bove 65 dB but not exceeding 75 dB[,]" and "Unacceptable" levels as "[a]bove 75 dB." 24 C.F.R. § 51.103, table.

the violation of which is remediable at all." Generally, to be legally binding on an agency, its own publications must have been "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *See, e.g., Schweiker v. Hansen,* 450 U.S. 785, 789-90, 101 S.Ct. 1468, 67 L.Ed.2d 685, (holding Social Security Administration Claims Manual is not binding agency rule); *Fano v. O'Neill,* 806 F.2d 1262, 1264 (5th Cir.1987) (holding INS Operations Instructions not binding because "they are not an exercise of delegated legislative power and do not purport to be anything other than internal house-keeping measures."); *W. Radio Servs. Co. v. Espy,* 79 F.3d 896, 900-01 (9th Cir.1996) (holding that the court reviews noncompliance with an agency "pronouncement" only if it "actually has the force and effect of law."); *Gatter v. Nimmo,* 672 F.2d 343, 347 (3d Cir.1982) (holding Veteran's Administration publications not binding because they were not promulgated under the APA's rulemaking requirements); *Fed. Land Bank in Receivership v. Fed. Intermediate Credit Bank,* 727 F.Supp. 1055, 1058 (S.D.Miss.1989) (holding that directive not promulgated according to APA procedure lacks force and effect of law); *see also Davis Mountains,* 116 Fed.Appx. 3, 9-10 (5th Cir.2004) (summarizing above case law and holding as result that the Air Force's Handbook is not binding as it was not promulgated according to the APA's procedural requirements). Where agency publications have not been so promulgated, the agency's decision to analyze impacts by other methods is not an automatic violation of the law. As such, it is subject to review under the normal "arbitrary and capricious standard" used to review agency action under the APA. *Davis Mountains,* 116 Fed.Appx. at 9-10 ("Thus the Air Force retained discretion to analyze impacts on livestock by methods other than those contained in the Handbook, and we must address the adequacy of the Air Force's chosen method according to the arbitrary and capricious standard"); *see also Communities Against Runway Expansion, Inc. (CARE) v.*

F.A.A., 355 F.3d 678, 688 (D.C.Cir.2004) (holding that even though an executive order mandating agency consideration of environmental justice concerns created no private right of action for an agency's failure to comply with that mandate, the court would review the agency's action as an exercise of discretion under the APA and NEPA). Here, plaintiffs neither argue nor offer evidence that HUD's guidelines were promulgated under the Administrative Procedure Act's procedural requirements. Plaintiffs's first argument therefore fails: HUD has not acted contrary to law by using methodology different from that contained in the Guidebook.

Plaintiffs also argue that HUD "obviously skewed [the study] to measure disproportionally during the quietest times of the day and bring the overall average decibel level down." Similarly, they appear to assert that HUD was arbitrary and capricious in not relying on the results of an extra-record noise survey completed in April 2001 by Citywide. They claim that HUD's chosen methodology improperly and purposely skews the survey results by including a measurement at noon, but no measurements between 7:30 A.M. and 12:06 P.M. nor between 11:46 A.M. and 2 P.M. They offer conclusory allegations that HUD's sampling survey produces distorted results and was conducted in that manner for the express purpose of avoiding the conclusion suggested by the extra-record Citywide survey.

At best, this argument reflects only a disagreement over whether it was arbitrary and capricious for HUD to base its decision on the study documented in the record rather than extra-record evidence. There is simply no evidence of bad or improper motive by HUD in this instance. Nor do plaintiffs provide further evidence showing either that reliance on such a methodology is otherwise arbitrary and capricious or that HUD's methodology was actually flawed, rather than simply different from plaintiff's preferred method. In fact, the Citywide study on which plaintiffs would urge reli-

ance does not comply with HUD regulations, which the agency must obey, let alone the Noise Guidebook's non-binding requirements.[3] The Citywide survey hardly amounts to persuasive evidence of noise levels that require an EIS under the HUD regulations. We may not, therefore, say that HUD arbitrarily and capriciously relied on the study's results in determining that the noise levels did not trigger the automatic environmental impact statement requirement.

Plaintiffs next argue that HUD's funding of the project without preparing an EISs was contrary to a CEQ regulation mandating an EIS when a project will "remove, demolish, convert, or substantially rehabilitate 2,500 or more existing housing units ... or ... result in the construction or installation of 2,500 or more housing units." 24 C.F.R. § 50.42(b)(2). Plaintiffs argue that this regulatory provision must be read expansively and cumulatively: that is, that each demolition of an old housing unit and each construction of a new housing unit should be counted cumulatively toward the 2,500 limit or trigger. Thus plaintiffs contend that, if a project proposes to destroy 1,250 old units and construct new 1,250 units in their place, an EIS is required because this would involve the destruction or construction of 2,500 units. HUD reads the regulation as disjunctively establishing two categories: demolition, conversion or rehabilitation of the old *vis-à-vis* construction or installation of the new; as applied to this case, HUD reasons that, since only 1,510 units are to be demolished or rehabilitated and only 1,282 are to be newly constructed or installed, the project does not reach the 2,500 unit trigger in respect to either category.

Plaintiffs effectively concede this point. They do not argue or attempt to show that HUD's interpretation is arbi-

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[3] As an example, the proffered extra-record survey took its measurements over a 12-hour period; 24 C.F.R. § 51.103(a), by contrast, requires measurements over a 24-hour period.

trary and capricious. Instead, they contend, without explanation, that we should not defer to the agency's reasonable interpretation as precedent would require, but that we ought to use our own judgment to declare that their interpretation of the regulation will be followed because it is simply the best. Even if we were to agree, however, we do not have the plenary authority to interpret the regulation in this kind of case as we personally deem best. "In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations.' " *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (quoting *Ehlert v. United States,* 402 U.S. 99, 105, 91 S.Ct. 1319, 28 L.Ed.2d 625 (1971) and *N. Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.,* 423 U.S. 12, 15, 96 S.Ct. 172, 46 L.Ed.2d 156 (1975)). Because the plaintiffs effectively concede that HUD's interpretation of the regulation is not unreasonable, we conclude that the regulation does not require an EIS in this case and that HUD did not fail to act in accordance with law in this respect.

B.

The theme of plaintiffs' remaining NEPA arguments is that HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment in many different ways. We address each argument under a separate heading. Before we begin, we pause to reiterate that in attacking a decision not to prepare an EIS, "more than an allegation of deficiencies is necessary; the *plaintiffs* must prove the essential allegations of their complaint by a preponderance of the evidence." *La. Wildlife Fed'n, Inc. v. York,* 761 F.2d 1044, 1055 (5th Cir.1985)

(Rubin, J., dissenting). "It is the burden of the plaintiffs to adduce evidence, not merely to make allegations or to rest on assumptions, establishing that the Corps was [arbitrary and capricious] in reaching the conclusion it did[.]" *Id.*

1. Environmental Justice

Executive Order 12898 instructs agencies to consider the environmental justice impacts of their actions. Exec. Order No. 12898, 59 *Fed.Reg.* 7629 § 6-609 (1994). The Order does not, however, create a private right of action. Thus, we review the agency's consideration of environmental justice issues under the APA's deferential "arbitrary and capricious" standard. *See, e.g., Communities Against Runway Expansion, Inc. (CARE) v. F.A.A.*, 355 F.3d 678, 688 (D.C.Cir.2004). Leaving aside legalisms, we see in this record no administrative insensitivity to racial or economic inequality. Instead, we see a project that HUD perceived reasonably as a community effort, endorsed initially by some who now oppose it, to renovate a deteriorating public housing project for the ultimate and enduring benefit of the community.

HUD's environmental justice study, completed in September 2002, looked at the area in which the project is being built and determined that those who return to live in the "new" St. Thomas will benefit from safer, more sanitary living conditions and an improved economic environment. It considers the problems of displacement, including the fact that residents still living in the project would be eligible for relocation under the Uniform Relocation Act. Furthermore, HUD's study reflected that St. Thomas residents had numerous complaints about the housing project and were at risk from pest infestations, asbestos, drug paraphernalia, lead exposure, and raw sewage. It notes, based on the comments received from then-residents, that many had complaints about the St. Thomas development and while some would stay there if conditions and amenities were improved, others

would prefer to become home owners outside of the project. Over 200 lawsuits had been filed over lead exposure in the housing units, and that 99% of residents belonged to a minority group.

The record also indicates that HUD received and responded to comments made at a public meeting by Mr. Brod Bagert, whose master's thesis had been highly critical of the HOPE IV program, and of the broader "market revitalization" approach to improving urban areas. His comments and his study use the St. Thomas project as an example to attack that particular theory of urban planning. HUD responded to Mr. Bagert's comments, indicating that while it understood the basis of his criticism of the HOPE IV approach to urban revitalization, the HOPE IV approach is clearly supported by Congressional mandate.

Plaintiffs offer Mr. Bagert's comments, and evidence of problems with residential relocations under the Uniform Relocation Act, for the proposition that HUD's evaluation of the project's impacts is entirely contradicted by the evidence.[4] The record in front of us is hardly so clear cut, and certainly reveals that HUD gave attention to the issues plaintiffs raise, for all they disagree with the conclusions. Beyond their allegations and Mr. Bagert's comments, which HUD clearly took under consideration, plaintiffs offer no evidence suggesting that the environmental justice study was arbitrary or capricious in its choice of methodology. We cannot, therefore, say that they have met their burden of showing that HUD's consideration of environmental justice concerns

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[4] Mr. Bagert's written report is outside the record. The district court denied plaintiffs's request to add it as a supplement to the administrative record. Plaintiffs challenge that ruling by the district court's decision only in response to its ruling on their Rule 59 motion, discussed *infra*. For the purposes of the immediate analysis, we are confined to the administrative record, which includes only Mr. Bagert's oral comments at a public meeting.

was arbitrary and capricious.

2. Zoning

The New Orleans City Council approved zoning changes for the project in November 2001 (for the retail portion) and in April 2002 (for the residential portion). In addition, implementing the St. Thomas revitalization project required the creation of a Tax Increment Financing District, which helps fund the project, and which was highly controversial with regard to its possible negative economic effect on local businesses near the project. In preparing the environmental assessment, HUD indicated only that the project was in compliance with local zoning ordinances by the time of the assessment, without indicating that such compliance actually required changing the local zoning laws. In addition, when describing the two twelve-story residential buildings and the 200,000 square-foot Super Wal-Mart retail center, HUD indicated on the environmental assessment form that the project was compatible with its surroundings in terms of land use, building type, height, bulk and mass, and density.

Plaintiffs challenge HUD's conclusion that local zoning changes implemented for the project do not create a significant environmental impact. First, plaintiffs assert that "[l]ocal zoning changes significantly impact the human environment[;]" but offer little support for their arguments. They offer *Sierra Club v. Marsh,* 769 F.2d 868, 872 (1st Cir.1985), for the proposition that an EIS is automatically required where the project radically alters existing land use, but we find that case inapposite. There, the court held that the Federal Highway Administration and Army Corps of Engineers could not support its FONSI by relying on land use regulations to safeguard the land because the project would radically alter land use. *Id.* Here, although HUD does cite to its compliance with local zoning ordinances as support for its FONSI, we have no change so radical as to be akin to replac-

ing an undeveloped wooded island with a marine terminal and industrial complex, as was proposed in *Marsh.* Thus *Marsh* offers us no such legal rule, nor do plaintiffs offer us support for drawing an analogy on the facts. The project in the case at bar, particularly the high-rise structures and the Wal-Mart center, is located on the Tchoupitoulas industrial corridor, and the remaining residential portion borders the nearby residential areas. Without further evidence supporting their allegations, we may not hold that HUD was arbitrary and capricious in determining that the zoning change of itself implied that the project would have a significant impact on the environment.

Second, plaintiffs assert that the implementation of the Tax Increment Financing District was a highly controversial change, such that it requires an environmental impact statement under the regulations set out by the Council on Environmental Quality. *See* 40 C.F.R. § 1508.27(b) (identifying a project's "highly controversial" nature as a factor to consider in evaluating the intensity of impacts). We have held that these factors listed in the regulation "do not appear to be categorical rules that determine by themselves whether an impact is significant." *Spiller,* 352 F.3d at 243. "As such, all that would have to be shown is that all the factors were in some way addressed and evaluated; whether this was done in factor-by-factor fashion is irrelevant." *Id.* Furthermore, "controversial" is usually taken to mean more than some public opposition to a particular use--rather it requires "a substantial dispute ... as to the size, nature, or effect of the major federal action." *See Center for Biological Diversity v. U.S. Fish & Wildlife Service,* 202 F.Supp.2d 594, 657-58 (W.D.Tex.2002) (summarizing existing case law with regard to what constitutes a "substantial dispute" such that an environmental impact statement is required). Reviewing the record, the portions to which plaintiffs cite clearly reflect public opposition from local businesses to using the retail space to house a Wal-Mart, but do not attack the broader nature or

effect of the project as a whole. The record clearly reflects that HUD addressed and evaluated this factor and plaintiffs do not adduce evidence suggesting that its evaluation was insufficient, but simply assert disagreement with the conclusion. Accordingly, they have not met their burden to show that HUD acted arbitrarily or capriciously.

3. Businesses Occupying Historic Buildings

CEQ regulations require agencies to discuss economic factors where interrelated with NEPA environmental considerations; such factors include the impact on "uniqueness of historic resources" and "adverse impacts on National Register properties". *See* 40 C.F.R. § § 1508.14 (requiring examination of interrelated effects), 40 C.F.R. § 1508.27 (list of NEPA intensity factors contributing to the determination of "significant impact" on "uniqueness of historic resources" and "adverse impacts on National Register properties"). As a result, HUD built into its EA an assessment of the project's impact on businesses occupying historic buildings.[5]

In reaching its FONSI on the issue, HUD relied on a broad range of information, including opinion polls, newspaper articles, and other studies-- notably, the Lambert Advisory Report. This last indicates that Wal-Mart will reduce some sales from local businesses, but also suggests that Wal-Mart may actually help the area retain some revenue which had previously left the city in favor of suburban retail. Other documents in the record are equally clear in identifying both the increase in competition posed by Wal-Mart as well as its potential economic benefits to existing retailers. HUD's ad-

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[5] HUD attempts to argue that even though it did consider this issue, NEPA does not require such a examination of "purely economic" impacts. The merit of this argument is dubious, since, as plaintiffs note, the loss of businesses in the district relates to the amount of money available to maintain historic buildings.

ministrative record also includes an inventory of area businesses (the "Blick inventory"), which is an admittedly "quick review" and contains errors, particularly in its characterization of what goods or services varying businesses provide.

Plaintiffs argue that HUD's reliance on the Blick inventory as "sole support" for its statement will not suffice in order to support a FONSI. Although their argument might have carried weight if the Blick inventory was HUD's sole source of information, HUD in fact considered information from a wide range of sources, which led it to conclude that although the Wal-Mart will bring increased competition to the area, adding the business to the area was also likely to result in an increase in economic opportunities for local retailers. Furthermore, plaintiffs simply misstate the record when they assert that HUD entirely ignored the Lambert report. Finally, plaintiffs proffer an alternative, extra-record inventory of local businesses. Beyond simply restating that study's conclusions, which are more favorable to their desired outcome, plaintiffs offer no evidence that would allow us to conclude that its methodology is any more reliable or its results any more robust than the studies HUD included in the administrative record. As a result, we cannot say that plaintiffs have met their burden in showing that HUD acted arbitrarily or capriciously.

4. Toxic and Hazardous Waste

HUD regulations do not permit that agency to approve projects that are not located an acceptable distance from "hazards" unless appropriate mitigation measures are taken. 24 C.F.R § 51.202(a). "Hazards" are defined to include any "any stationary container which stores, handles or processes hazardous substances of an explosive or fire prone nature." 24 C.F.R. § 51.201. Accordingly, HUD's EA included an investigation into whether any such hazards threatened the St. Thomas project as a part of the process. It conducted two Phase I assessments, which identified certain

toxic and hazardous waste issues, including both an underground storage tank containing petroleum products and a fuel pump, both located on the Wal-Mart site. A later Phase II assessment recommended methods for remediation, and in mitigation HUD required Historic Renovation, the developer, to set up an escrow account to ensure remediation. The environmental assessment openly discusses the presence of these hazards in the comments to the section on "toxic chemicals and radioactive materials." Those remarks clearly reflect the need for a Phase II assessment, the presence of an underground storage tank, and the remediation requirements. HUD's actions comply with their regulations, and are not arbitrary or capricious in this respect.

Plaintiffs accuse HUD of violating its duty to disclose the existence of an underground storage tank by failing to disclose it in the section of the environmental assessment meant to identify "hazardous industrial operations". Their brief chargesthat HUD purposely committed deception by not listing the hazards in that section, and did so with the sole purpose of avoiding the preparation of an EIS. They offer no evidence that HUD's required remediation is insufficient to warrant a FONSI, nor any evidence to support their claims of bad faith. Nor do they offer any legal argument that the hazards must be listed in that specific section of the form, rather than in the location HUD placed it. In fact, the record reflects that the EA clearly reveals that the hazards are present and indicates the remediation planned to reduce the effects of those hazards. As a result, plaintiffs have not made any showing that HUD engaged in purposeful concealment or arbitrarily relied on the remediation measures in reaching its FONSI.

5. Lead Contamination

24 C.F.R. § 50.3(i)(1) requires that HUD must ensure its projects are free of "hazardous materials, contamination, toxic chemicals and gasses, and radioactive substances"

that would "affect the health and safety of occupants or conflict with with the intended utilization of the property." In doing so, HUD must pay "particular attention" to industrial sites and other areas containing hazardous waste, using "current techniques by current professionals." 24 C.F.R. § § 50.3(i)(2), (3). As a part of its EA process, therefore, HUD considered whether the project area had significant lead contamination. We hold that the agency was not arbitrary or capricious in determining that the environmental impact from lead in the soil was not significant.

The agency hired a contractor, PSI, to carry out the Phase II environmental assessment already mentioned above; as a part of that work, PSI took various soil samples. The contractor was particularly concerned with lead in the soil coming from underground storage tanks and old dry-cleaning facilities. When it tested the samples, PSI found that the levels of lead in the soil were below the health-based limit set by the Louisiana Department of Environmental Quality. Based on those results, HUD determined that the environmental impact from lead in the soil was not significant.

HUD later received public comments on its separate environmental justice study from a soil expert, in response to a statement in that study that surface lead contamination in the project was not a problem. The expert stated that his soil surveys for lead contamination in New Orleans found that the St. Thomas community was one of "the most contaminated areas in the city" and "recommended concerted effort" to address the problem. On receipt of those comments, and in light of the PSI results, HUD asked C-K Associates, the contractor that had prepared the environmental justice study, about the effect of those remarks on the EA. C-K Associates responded by saying that although the expert was well-respected in his field, his methodology did not follow the standards HUD required for evaluating lead levels. Given that the PSI tests had shown lead levels below the permissi-

ble maximum and that the outside expert's methods did not meet agency requirements, HUD maintained its conclusion that lead contamination at the site was not significant for the purposes of the EA.

Plaintiffs disagree mightily with PSI's technique and clearly prefer the outside expert's methodology, urging that HUD arbitrarily and capriciously relied on PSI's unsound techniques. The mere fact of HUD's reliance on the PSI study is not arbitrary and capricious. We have held that "[an] agency is not required to 'do it alone' " in reviewing the environmental impact of projects, and may employ outside consultants in preparing an environmental assessment. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 642 (5th Cir.1983). "The intent of the controlling regulations is that 'acceptable work [completed by parties outside the agency] not be redone[.]' " *Id.* (citing 40 C.F.R. § 1506.5(a)). Furthermore, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *see also, Mississippi River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir.2000); *Sabine River,* 951 F.2d 669, 678 (5th Cir.1992). An agency may not, however, "reflexively rubber stamp" information prepared by others. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 643 (5th Cir.1983) (citing *Sierra Club v. Lynn,* 502 F.2d 43, 58-59 (5th Cir.1974)); *Sierra Club v. Sigler,* 695 F.2d 957 (5th Cir.1983).

On this record, we find that plaintiffs have not shown that either HUD's reliance on PSI's study or PSI's methodology were arbitrary and capricious. HUD's administrative record, however, clearly reflects that when public comment called possible flaws in PSI's methods or results, HUD inquired into the problem and, on consideration of the evidence, chose to continue to rely on PSI for sound reasons. In

support, plaintiffs can only point to the results of the outside study and the soil expert's comments. As C-K Associates noted, however, HUD could not rely on plaintiffs' preferred method without violating its own standards. Furthermore, the soil expert's comments state only that the project has the highest lead contamination in New Orleans, and do not contradict PSI's findings that the lead-levels are within of health-based standards. Beyond their allegations and the above comparisons, plaintiffs offer no concrete evidence to support their arguments. Accordingly, we conclude that HUD was neither arbitrary nor capricious in relying on PSI's conclusions in reaching its FONSI.

6. Traffic

When studying the project's potential effects, HUD looked at the possible impacts of increased traffic. A September 2001 traffic study examined streets and major intersections in the project--locations where it thought any increase would likely cause problems. A second study, carried out in December 2002, looked at the effect traffic increases would have in areas outside of that already covered by the original study. HUD also carried out noise and vibration studies, and included traffic as a factor in its environmental site assessments, environmental justice study, and mitigation requirements. The New Orleans Department of Public Works and the Regional Planning Commission also studied traffic impacts and concluded that the effects would not be significant. On the record before us, which includes all of the above, we hold that the agency did not arbitrarily or capriciously reach its FONSI with regard to traffic.

Plaintiffs attempt to whittle away at HUD's support for its findings. They assert that HUD relies solely on the December 2002 study to reach its conclusions. The 2002 study, they allege, covers only outlying areas and therefore cannot, alone, support HUD's determination. Their characterization of the record is simply inaccurate: as recounted

above, HUD relied on far more than just that study, and in fact made certain to incorporate traffic effects into its study of other potential impacts as well. Second, plaintiffs urge that the bare fact that HUD predicts a 67% increase in traffic should suffice for any impacts of that traffic to be automatically "significant" for NEPA purposes. will have *per se* significant effect. They offer us no legal authority for the proposition that a predicted increase should be considered *de facto* significant. Moreover, while plaintiffs allege a long list negative effects on health, safety, noise, pollution, vibration, and historic properties, they offer us no evidence as to what those effects would be, why they would be significant, or how HUD has failed to investigate them. In addition, the record described above belies the assertion that these effects have gone unstudied in HUD's EA. As a result, we may not say that HUD's decision was arbitrary and capricious in this regard.

7. Cumulative Impacts

Plaintiffs argue, in effect, that HUD should be charged with constructive knowledge of significant foreseeable cumulative effects upon human environment that were discoverable upon reasonable investigation. They beg the question, however, by assuming without demonstrating with concrete supporting evidence that the significant effects they allege were reasonably foreseeable at the time of HUD's EA/FONSI.

The plaintiffs assume that it was reasonably foreseeable to HUD that the project would cause two types of significant environmental effects: 1) future unspecified impacts caused by the influx of additional national retailers attracted by Walmart's presence and 2) future impacts of increased traffic from the above combined with future impacts by three other planned expansions in the area.[6] Although the plaintiffs

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[6] Namely, the future expansion of the Morial Convention Center, the

have not established either the foreseeability or the significance of these effects, we discuss them briefly:

First, NEPA requires HUD to study a project's reasonably foreseeable effects. Plaintiffs' sole allegation is that HUD failed to study the detrimental effects of the eventual arrival of other, unknown national retailers into the area, following Wal-Mart's wake. They offer nothing concrete to suggest that such changes will likely occur or are planned for in this particular project area, but rely on broad statistical data discussing general national trends. However, reasonable foreseeability under NEPA "does not include [such] 'highly speculative harms[.]' " *City of Shoreacres v. Waterworth,* 420 F.3d 440, 453 (citing *Methow Valley Citizens Council,* 490 U.S. at 356, 109 S.Ct. 1835). As a result, plaintiffs' arguments fail.

Second, after studying the anticipated effects of increased traffic, HUD decided that the project would not cause traffic levels that would significantly affect human environment. In reaching its decision, HUD relied on two traffic studies performed by a contractor in December 2000 and September 2001. The latter was performed specifically to incorporate the effects of known plans for other development projects in the area. HUD relied on the traffic studies' projection of traffic conditions subsequent to completion of the St. Thomas revitalization project and the three other planned expansions. The studies indicated that traffic levels would remain well below capacity. HUD's reliance on those results was not arbitrary, capricious or unlawful, and plaintiffs' argument to the contrary lacks merit.

In support of their position, plaintiffs cite to inconsis-

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expanded terminal activities at the Port of New Orleans, and the development of the Saulet Apartment complex.

tencies in background traffic measurements; noting that the September 2001 measurement for Jackson Avenue is lower by 3,600 cars than the December measurement, and arguing that the September 2001 measurement is purposely skewed in order to support the FONSI. First, plaintiffs provide nothing but conclusory allegations to support their claims of bad faith. Second, we note that HUD's findings relied on a separate set of measurements, different from the challenged background traffic measurements, that specifically reflect the potential road conditions after the completion of the St. Thomas project and the four other planned activities. Furthermore, we note that even if the higher, December 2001 measurement for Jackson Avenue is taken as correct, the street is still predicted to operate at some 30,000 cars below capacity. As a result, we cannot say, on this record, that plaintiffs have adequately supported their allegations of significant foreseeable cumulative effects on human environment due to increased traffic caused by the project.

8. Mitigation

In reaching its FONSI, HUD relied in part on the mitigation requirements contained in the MOA developed as a part of required NHPA planning. On examination, we find that HUD did not rely on them arbitrarily or capriciously. The MOA's requirements were meant to alleviate adverse impacts on historic properties; many of its mitigation requirements focused on reducing the adverse effects on increased traffic on those properties. The measures are extensive, including "design review of new construction, rehabilitation of historic buildings, use of Belgian blocks to slow traffic at multiple intersections, and restriction of the entrance of truck traffic to Wal-Mart to Tchoupitoulas and Josephine Streets[.]" The MOA also requires the signatories to the MOA to ask the City to convene a traffic task force, seek funding for improvements to Jackson Avenue, and identify grants for local retailers. Furthermore, the MOA binds the Housing Authority of New Orleans and HRI to its terms.

Any attempt to change it requires consultation with and approval by all signatories, including federal and state agencies set up to protect historic areas. To reiterate, HUD is bound to adhere to the MOA's requirements, and may not relax or abandon them without the express authorization of all parties.

Plaintiffs argue that the above requirements will not provide the predicted mitigation, and that HUD's reliance on them is arbitrary and capricious. Plaintiffs characterize the mitigation as requiring merely letter-writing, mild research, and limited consultation. Furthermore, plaintiffs argue that the MOA has no teeth, as it can be changed at any time. Again, plaintiffs assume without demonstrating that such measures of mitigation are inherently unreliable and that an agency cannot reasonably base its decision to forgo an EIS, in part, upon them. The record before us, however, does not support their allegations. They have not, therefore, shown that HUD relied on those mitigation requirements arbitrarily or capriciously.

9. Evaluation of Project Costs and Benefits

CEQ regulations state that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1). Plaintiffs argue that HUD is required to produce an EIS even though the project has no significant negative environmental effects, so long as it has significant positive environmental effects. This court has rhetorically considered the question, but has not arrived at an answer. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 426-27 (5th Cir.1973) (*disavowed on other grounds*). We need not do so here, as HUD has not asserted nor have plaintiffs offered evidence of a significant positive environmental impact; HUD only indicates that when the overall benefits of the project are weighed against the temporary inconveniences of construction and any "partial long term market disruption[,]" the St. Thomas

project "provides a very positive net benefit to the community." Moreover, the other case in this circuit touching on the question can be distinguished on the grounds that it determines only whether an EIS need discuss positive benefits. *Environmental Defense Fund v. Marsh,* 651 F.2d 983, 993 (5th Cir.1981). Without more, we may not find HUD arbitrary and capricious in this regard. Plaintiffs also urge that HUD improperly subtracted the project's positive environmental impacts from its negative environmental impacts, so that once significant negative effects became insignificant. The record before us is clear, however, that HUD has not engaged in any such weighing. Rather, it evaluated the potential negative effects and determined that they are not significant, either individually or cumulatively. Again, without further support, we may not say that HUD's assessment was arbitrary and capricious.

10. Consideration of Context and Intensity

Council on Environmental Quality regulations require an agency to consider both "context" and "intensity" when considering whether an effect is "significant". 40 C.F.R. § 1508.27 (defining "significantly" as used in NEPA's statutory language). In considering context, an agency must look at "the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). When evaluating intensity, agencies should consider ten areas, listed in 40 C.F.R. § 1508.27(b). This court has held that "the factors listed in the regulation do not appear to be categorical rules that determine by themselves whether an impact is significant." *Spiller,* 352 F.3d at 243. Rather, the regulation provides a list of "relevant factors ... [for] gauging whether an impact is 'intense'[.]" *Id.* An agency must only show that each factor was "in some way addressed and evaluated." *Id.*

First, with regard to intensity, our discussions in

various sections above have repeatedly concluded that HUD built in context consideration to its examination of a wide range of impacts, particularly with regard to environmental justice, zoning, businesses occupying historic properties, and traffic. In addition, those same discussions touch on HUD's consideration eight of the ten factors that Council on Environmental Quality regulations require agencies to consider regarding the intensity of a project.[7] Plaintiffs allege that their mere presence is reason enough to require an environmental impact statement. As support, plaintiffs offer arguments that reiterate those discussed in the sections above. As noted, the listed factors do not constitute categorical rules such that their presence or absence means an impact is *per se* significant. *See Spiller v. White,* 352 F.3d 235, 243 (5th Cir.2003). HUD must therefore show only that it addressed and evaluated these factors, even if it did not do so in a "factor-by-factor fashion" *Id.* We have concluded, in the preceding subsections, that HUD has not acted arbitrarily and ca-

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[7] Namely, the following sections of 40 C.F.R. § 1508.27(b):

(1) Impacts that may be both beneficial and adverse ....

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

priciously in its evaluation of the project's context nor in its assessment of various individual intensity factors. Similarly, we now conclude that its overall evaluation of the project's context and intensity as a whole neither arbitrary or capricious.

Plaintiffs arguments on these points largely rehash the arguments they raised individually above, and we will not repeat our analysis of them here. Their only new arguments relate to traffic and to potential adverse effects on historic resources. They first argue is that the impacts of traffic were sufficiently controversial and uncertain that HUD was required to prepare an EIS. *See* 40 C.F.R. § 1508.27(b)(4). They adduce no evidence on this point, however, beyond their own opposition to the project and the same assertions we disposed on in our analysis *supra,* in discussing traffic impacts and cumulative impacts. As they have not met their burden of proof as to the broader controversy of traffic impacts, and since we above held that HUD's consideration of traffic issues was neither arbitrary nor capricious, we now do not find HUD's behavior arbitrary and capricious in this regard.

Second, plaintiffs argue that HUD did not properly consider the project's potential adverse effects on historic properties, as required by 40 C.F.R. § 1508.27(b). These arguments are similar to those they raise challenging HUD's findings under the NHPA review process, discussed *infra,* and we reject them for the same reasons: HUD has prepared a valid Memorandum of Agreement that the consulting parties have agreed adequately resolves the project's potential adverse effects on historic properties, and was not arbitrary and capricious in determining that no National Historic Landmarks were adversely affected. *See* 16 U.S.C. § 470h-2(i) (stating that the NHPA shall not "be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required" under

NEPA.).

11. Conclusion

Plaintiffs have raised numerous objections to HUD's EA and FONSI, but plaintiffs have failed to demonstrate in any instance that HUD acted arbitrarily, capriciously, or contrary to the law in deciding that the project did not cause significant effects to human environment.

III.

Four National Historic Landmarks are located in the St. Thomas project's Area of Potential Effects: the Garden District, the Vieux Carre, St. Alphonsus Church, and St. Mary's Assumption Church. Other historic properties are also located near and in the project site. Under NHPA § 106, HUD is required to consider the effects of its actions on these historic properties by the National Historic Preservation Act. As under NEPA, an agency's actions under the NHPA are procedural, and our review of its decisions is conducted under the Administrative Procedure Act's "arbitrary and capricious" standard. *Vieux Carre Property Owners, Residents, & Assocs. v. Brown,* 875 F.2d 453, 456 (5th Cir.1989).[8]

A federal agency, the Advisory Council of Historic Preservation ("ACHP") has promulgated regulations that require federal agencies to examine whether a proposed project "has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). Where an agency proposes a finding of

[8] These challenges arise out of the same cross-motions for summary judgment as the NEPA claims discussed *supra.* Plaintiffs contend that the district court erred in ruling that HUD arbitrarily and capriciously concluded that the project would result in no adverse effects to historic properties. Again, we review the district court *de novo* on this point. *See Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 877 (5th Cir.2002) (citing *Auguster v. Vermilion Parish Sch. Bd.,* 249 F.3d 400, 401 (5th Cir.2001)).

no adverse effect, it indicates that the project has no effect on any historic property that "diminish[es] the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(b) (read in conjunction with (a)(1)). Such a finding triggers a "consulting party review", described in 36 C.F.R. § 800.5(c).

If the agency finds that historic properties will suffer adverse effects, the agency must consult with the ACHP and the State Historic Preservation Officer ("SHPO") and other parties "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." *See* 36 C.F.R. § 800.5(a) (requiring agencies to assess adverse effects); 36 C.F.R. § 800.6(a) (requiring consultation). If adverse effects are found, and the agency, the SHPO, and the ACHP (plus any other required parties) may agree on a method of resolving those effects, to be recorded in a Memorandum of Agreement that specifies the manner of resolution. 36 C.F.R. § 800.6(b)(1)(4).

As in respect to environmental effects under NEPA, however, an agency has no duty to abandon or modify a project if the project is found to have an adverse effect that is not avoided or mitigated, but only to follow the mandated NHPA procedures.[9] 36 C.F.R. § 800.6. There is an exception to that rule applicable to National Historic Landmarks, as specially designated historic properties. They are subject to more stringent requirements. When an agency action will cause a direct adverse effect to a National Historic Landmark, the agency has an affirmative duty under NHPA § 110f to minimize the harm done. *See also* 36 C.F.R. §

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[9] Note that in many cases, as here, NHPA review is often built into the NEPA review process. *See* 36 C.F.R. § 800.8(c) (permitting such combination).

800.10(a)

Plaintiffs raise two challenges to HUD's compliance with the NHPA: 1) that HUD's compliance with the NHPA § 106 process was defective and 2) that HUD had, and neglected to fulfill, a duty to minimize direct harm to National Historic Landmarks under NHPA § 110f. We deal with each in turn.

A.

Based on its finding that the St. Thomas project would result in some adverse effects, HUD went through the required consulting process with the SCHP, ACHP, and other required parties. HUD originally produced an MOA for the project in September 2000; no one challenges the fact that HUD was not a signatory to that document, and that as a result it may not have met the NHPA's requirements. *See* 36 C.F.R. § 800.6(c)(1)(I). In September 2002, however, HUD reopened its NHPA review, which resulted in a second, final MOA. The second MOA covers more of the project than the first MOA, which covered the residential portions of the project and rehabilitation of the five remaining St. Thomas buildings. The second document covers all of the above, plus the Wal-Mart site and a nearby historic property, the Amelia Cotton Press. The document is signed by all necessary parties and contains various provisions meant to mitigate the project's effects on historic properties.

Plaintiffs argue that HUD's failure to sign the first MOA taints the validity of the second MOA. They assert that the second document can only be taken to cover the Wal-Mart and the Amelia Cotton Press and that, as a result, HUD has not adequately considered adverse effects on historical properties arising from the residential and rehabilitation portions of the project. We are not persuaded.

Plaintiffs offer no legal authority to suggest that the

second MOA may not incorporate and bind the parties to, among other things, the same terms that had been included in the first, incomplete or deficient document. Second, a plain reading of the final MOA shows that it covers the effects of and mitigation for the entire project. Plaintiffs offer no evidence that the document is meant to be interpreted in the limited fashion they urge. Accordingly, we adhere to the general rule that, absent other evidence, "[a] memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106." 36 C.F.R. § 800.6(c). Plaintiffs cannot, therefore, show that HUD was arbitrary or capricious in relying on the second, final MOA as proof of its compliance with the requirements of NHPA § 106.

Plaintiffs' second argument asserts that HUD was required to undertake the "consulting party review" process laid out in 36 C.F.R. § 800.5(c). This assertion, however, misreads the governing regulations. 36 C.F.R. § 800.5(c) only requires consulting party review where HUD proposes a finding of no adverse effect on *any* historic property within the project's area of potential effects. Here, HUD made no such proposal; in fact, the agency found that there were adverse effects on certain historic properties such that it needed to consult with the ACHP and SHPO to produce an MOA. The situation simply did not meet the requirements triggering 36 C.F.R. § 800.5(c). Plaintiffs's assert that a finding under NHPA § 110f of no adverse effects on National Historic Landmarks *also* triggers § 800.5(c)'s provisions, but offer no legal support for that reading, which conflicts with the plain language of the regulation. As a result, we conclude that HUD was not in violation of the NHPA's procedural requirements in not conducting consulting party review under § 800.5(c).

B.

As noted above, NHPA § 110f imposes an affirma-

tive duty on federal agencies to minimize harm to National Historic Landmarks where it finds that a project will adversely affect such landmarks. In conducting its assessment of whether the St. Thomas project would cause such adverse effects, HUD relies on the opinion letter it received from the National Park Service. That opinion letter was drafted by Cecil McKithan, a Park Service employee, after he visited the project site for that express purpose. In it, Mr. McKithan stated that the St. Thomas project would not adversely affect the National Historic Landmarks. HUD relied on that letter in reaching its determination that the project would have no adverse effect on National Historic Landmarks in the area.

By October 2002, the State Historical Preservation Officer, the Advisory Council on Historic Preservation, and other consulting parties had expressed their objection to that determination. At that point, National Park Service contacted HUD at that point to let the agency know that it was reexamining its conclusion in response to those concerns. Mr. McKithan had by then retired, and the Park Service was reviewing his findings out of concern that it lacked sufficient information to support his determination. On December 16, 2002, however, the National Park Service withdrew its request for more time to assess the project's impact, on the grounds that it had reexamined the materials before it. In doing so, the National Park Service stated that "HUD, in accordance with 36 C.F.R. § 800.10(c), appropriately sought National Park Service's comments and relied on those comments in good faith[.]" It did not withdraw its statement that the project would have no adverse effect. By February 2003, both the SHPO and the ACHP, the very parties who had initially questioned HUD's determination of no adverse effect with regard to NHLs, had again signed onto the MOA, indicating their agreement with that determination. *See* 36 C.F.R. § § 110f(a) (noting that the results of the § 110f review process are to be incorporated into the NHPA § 106 process), 800.6(c) (a signed MOA evidences the agency's

official compliance with NHPA § 106).

Plaintiffs challenge HUD's conclusion that the project will have no significant impact on National Historic Landmarks, arguing that HUD was arbitrary and capricious in relying on the NPS's recommendation since it knew that the Park Service's recommendation was unsupported and incorrect. Essentially, they argue that the National Park Service's request for additional time to reconsider its determination renders HUD arbitrary and capricious for relying on the National Park Service's finding of no adverse impact. HUD may rely on the reasonable opinions of its own experts, however, and despite the reexamination, the National Park Service did not, as plaintiffs allege, withdraw its determination of no adverse effects. *See Marsh,* 490 U.S. at 378, 109 S.Ct. 1851 (1989). Indeed, despite the significant consideration given to outside concerns, the National Park Service refused to rescind its decision. Without some further evidence pointing to flaws in the National Park Service's decision-making process and conclusion, HUD was not arbitrary and capricious in relying on the National Park Service's determination as support for its conclusion that the project would have no significant impact in this regard.

IV.

In addition to contesting HUD's decisions based on it EA/FONSI and MOA, plaintiffs also challenge the district court's disposition of various motions. They first appeal from the district court's findings of ripeness and mootness with regard their challenges of the earlier versions of the environmental assessment/FONSI and MOA.

A.

Plaintiffs filed suit in July 2002, seeking declaratory judgment that HUD and The Housing Authority of New Orleans failed to comply with NHPA and NEPA and an injunction forcing HUD to withhold grant funds until The Housing

Authority of New Orleans became compliant. In October 2002, plaintiffs filed a motion for partial summary judgment and permanent injunction. On February 21, 2003, the district court granted HUD's motion for summary judgment, concluding in part that plaintiff's claims were not yet ripe for review because the court was "under the impression that the NEPA review was still pending." HUD had, in fact, closed the re-opened review on February 20, 2003, having again undertaken an environmental assessment and reached a FONSI; HUD, The Housing Authority of New Orleans, the SHPO, and ACHP entered an amended MOA on February 1, 2003.

Plaintiffs challenge the district court's disposition on summary judgment of their challenges to the first environmental assessment/FONSI and MOA completed for the St. Thomas redevelopment project, before those processes were reopened by HUD. A grant of summary judgment is reviewed *de novo,* "applying the same standard on appeal that is applied by the district court." *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 877 (5th Cir.2002) (citing *Auguster v. Vermilion Parish School Board,* 249 F.3d 400, 401 (5th Cir.2001)).

In deciding whether a matter is ripe for review, the court must consider "both the fitness of the issue for the judicial determination and the hardship to the parties of withholding consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In making its determination, the court should evaluate three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

The district court here determined that while the complaint clearly met the case or controversy requirement of Article III, "judicial review at [that] time [was] inappropriate in light of the reopened reviews [,]" particularly since "[t]he ordinary remedy for unsustainable agency findings under NEPA is to remand the matter to the agency 'for further consideration.' " Accordingly, it held that at that time the claim would have inappropriately interfered with agency action, *viz.*, the reopened NEPA and NHPA review processes. In considering the other two *Ohio Forestry* factors, it found that plaintiffs had "failed to demonstrate any hardship" would be suffered as a result of withholding review. Plaintiffs' motion to the district court alleged that "infrastructure work is being [per]formed, which is eliminating the possibility of real consideration of alternatives to the present project," and that "[d]elay of review will harm plaintiffs['] ability to receive a true review of the Project's impact on the human environment and historic properties." A review of the record, however, indicates that the district court was given no further explanation or support for the statements beyond the allegations. Finally, the district court rightly noted that review at that time would entail judicial review of "an admittedly incomplete administrative record," as the processes in question had been reopened.

Given all of the above, the district court did not err in determining that the issue was not yet ripe for review: plaintiffs clearly had not made the showing necessary under the *Ohio Forestry* test, and their arguments fail before our court now for the same reasons.

B.

On March 31, 2003, plaintiffs amended their complaint to include the original environmental assessment/FONSI and MOA as well as the environmental assessment/FONSI and the MOA resulting from the reopened process. Plaintiffs then filed a second motion for summary

judgment and for a permanent injunction on April 4, 2003, again alleging noncompliance with NEPA and the NHPA, and seeking to stop all work on the project until an environmental impact statement and Section 106 review had been properly completed. That same day, HUD, The Housing Authority of New Orleans, and HRI all filed motions for summary judgment on the grounds that the reopened review complied with NEPA and NHPA. On April 11, 2003, the court entered an order in the case denying the plaintiffs' motion and granting HUD's motion in part. In that order, the court dismissed all of plaintiffs' claims arising under the NHPA. The court left open issues related to the first environmental assessment and FONSI insofar as they were necessary to determine awards of attorneys' fees, but stated that "the relief for remedying a deficiency in the original environmental assessment/FONSI deficient [*sic*] is now moot."

In March 2004, the court dismissed all of plaintiffs' remaining claims. In doing so, it held that the claims against the original MOA were moot, as they had been previously dismissed and were subject to the "law of the case" doctrine. In addition, the court held that challenges to the original environmental assessment/FONSI were moot and did not fall within the "capable of repetition, yet evading review" exception.

Plaintiffs first argue that the claims against the original MOA are not made moot by the law of the case doctrine because the later MOA does not encompass the entire project. The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson,* 225 U.S. 436, 443, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). The doctrine applies not only to issues decided explicitly, but also to everything decided "by necessary implication." *Browning v. Navarro,* 887 F.2d 553, 556 (5th Cir.1989). We reject this argument for the reasons discussed *supra;* the second, final

MOA is a comprehensive document and supercedes the original.

Corrective action by an agency can moot an issue. *See, e.g., Commissioner v. Shapiro,* 424 U.S. 614, 622-23 n. 7, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976) (holding that proper service of new notice of deficiency and new notices of levy moots question as to whether prior actions were procedurally defective). Other circuits have found that subsequent agency action under NEPA moots a challenge to original compliance where there is no relief that would "undo" the harm. *See Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.,* 175 F.3d 1156, 1163 (9th Cir.1999) ("The ... complaints are stale because a final environmental impact statement was prepared and we can grant no relief that would 'undo' the operation of the [noncompliant agency action] during the period between issuance of the 1995 ROD and the final environmental impact statement."); *see also* Wright & Miller, Federal Practice and Procedure, § 3533.7 ("At any rate, self-correction again provides a secure foundation for mootness so long as it seems genuine."); *id.* § 3533.2 ("Action by the defendant that simply accords all the relief demanded by the plaintiff may have the same effect as settlement. So long as nothing further would be ordered by the court, there is no point in proceeding to decide the merits .... [M]ootness arises from the fact that in one way or another, the parties have acted voluntarily to dispose of the plaintiff's original claim for relief.")

In reopening the NHPA process, HUD took the voluntary action required to address plaintiffs' original claims. At the closure of that process, a second, final MOA was produced. As the St. Thomas project is no longer proceeding under the original version of the MOA, any remaining challenges to its validity have been mooted. The district court rightly disposed of claims against the final MOA in its April 13, 2003 ruling and, in its March 2004 ruling, explicitly rec-

ognizes the implicit results of that decision.

Plaintiffs next argue that the district court erred in refusing to apply the "capable of repetition, yet evading review" exception to their challenges against the original environmental assessment/FONSI. This exception to the mootness doctrine applies where (1) the challenged action is too short to be fully litigated before it ceases and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Benavides,* 238 F.3d at 671 (quoting *Spencer v. Kemna,* 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)). Plaintiffs do not argue the second requirement at all. As to the first, they argue that HUD is likely to avoid review on other proposals, plans, or actions by using the tactic of reopening NEPA or NHPA review. It is not, however, inappropriate to permit agency reconsideration to moot an initially unripe claim where the behavior involved no longer plays a causal role in the harm alleged. *See Ohio Forestry Ass'n, Inc.,* 523 U.S. at 734, 118 S.Ct. 1665. Here, HUD took corrective action when it reopened its NEPA review processes, which, despite its reconsideration, still yielded a FONSI; plaintiffs have not demonstrated that the original FONSI still plays a causal role in the various harms they assert under NEPA. Accordingly, the later challenges to the original environmental assessment/FONSI and MOA were correctly denied as moot.

V.

Plaintiffs next challenge the district court's April 11, 2003 rulings on their Rule 59 motion regarding (1) the completeness of the administrative record, (2) the prejudicial effect of the expedited briefing schedule, and (3) the application of an incorrect standard of review.

Rulings on Rule 59(e) motions are reviewed for abuse of discretion. *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990). Unless the district court clearly abused

its discretion in determining that plaintiffs' motion neither established a manifest error of law or fact nor presented newly discovered evidence, the district court's ruling should not be disturbed. *Id.*

A.

Plaintiffs attempt to introduce several pieces of extra-record evidence in arguing that HUD was arbitrary and capricious in issuing a FONSI. In their Rule 59(e) motion, they argued that the administrative record was created impermissibly in response to litigation and does not contain certain documents that should be part of the record. Among these documents are Mr. Bagert's highly critical study of the HOPE IV program and the St. Thomas project in particular, a lead contamination study referred to by Dr. Mielke in his comments to the environmental assessment regarding lead contamination, and a Citywide Testing noise survey from April 20, 2000, which found high levels of noise.

The district court refused to grant reconsideration on the issue on the grounds that plaintiffs had failed to show that any of the documents in the record were created *post hoc* or not relied on by HUD in its decision-making. It further noted that plaintiffs' argument regarding the completeness of the record was "essentially a new vehicle for asserting the same arguments they made in opposition to summary judgment--*i.e.*, that HUD failed to adequately consider certain potential environmental impacts and ignored contrary information regarding these impacts."

Extra-record evidence may be admitted if necessary to determine whether an agency has adequately considered adverse environmental impacts. *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir.1999); *Sabine River*, 951 F.2d at 678. A district court's decision regarding the admissibility of extra-record evidence is reviewed for abuse of discretion. *Davis Mountains Trans-Pecos Heritage Ass'n v. Federal*

Aviation Admin., 116 Fed.Appx. 3, 16 (5th Cir.2004) (citing *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir.1998)) and referencing *Davidson Oil Country Supply Co. Inc. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir.1990) ("stating that '[t]he trial court's discretion to admit or exclude evidence is generally broad' ").

As our analysis *supra* records, HUD fulfilled its duty under NEPA: it identified the issue, assessed it, and reached a supported conclusion, and we find no error in the district court's grant of the motion for summary judgment. While plaintiffs may disagree with the outcome, HUD's environmental assessment did consider the issues raised, and included at least some of the information evidence plaintiffs urge was completely ignored, as has been discussed *supra*. We agree with the district court's assessment that the administrative record adequately supported HUD's FONSI, and similarly hold that the district court did not abuse its discretion in denying plaintiffs' Rule 59 motion in this respect. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

B.

Plaintiffs second challenge to the district court's denial of their Rule 59(e) motion alleges that they were prejudiced by the expedited briefing schedule, which was created as a result of HUD's misstatements regarding important deadlines.

On March 20, 2003, the district judge held a status conference, at which it set an expedited schedule for reviewing the newly issued environmental assessment/FONSI and MOA based on the fact that the closing on the Wal-Mart site was scheduled for April 15. The district judge notes that plaintiffs "consented to an expedited schedule and even took part in negotiating the details of that schedule." HUD filed the Administrative Record on March 27, 2003; cross motions

for summary judgment were filed April 4, 2003. Oppositions were filed on April 8, and oral argument held on April 10.

In an April 3 phone conference, plaintiffs requested an additional court day (from Friday to Monday) in which to review the record; the district court denied the request. The scheduled closing was delayed, finally occurring in October 2003, due to the pendency of a state-court bond validation lawsuit in which plaintiffs were also participants.

The district court did not abuse its discretion in denying the motion on this ground: all parties were subject to the same time constraints, plaintiffs helped develop and agreed to the expedited schedule, and further, the closing was delayed due to a lawsuit in which plaintiffs were also participating.

C.

Plaintiffs urge that the district court should have applied a more stringent standard of review to the NEPA process based on the fact that HUD's administrative record amounts to *post hoc* rationalization of its decision to issue a FONSI. As a basis, plaintiffs cite to the fact that certain studies were completed after the environmental assessment process was reopened. Nothing in the record, however, suggests that the information HUD provided was completed to provide *post hoc* justification for the agency's final environmental assessment/FONSI. Rather, the documents appear to be those relied on by HUD in reaching its determination after reopening the process. Furthermore, the reopened process led to changes in the project--notably, the imposition of additional traffic control measures. Since plaintiffs have not sufficiently demonstrated *post hoc* rationalization or prejudgment, the district court applied the proper standard of review; *viz.*, "arbitrary and capricious."

VI.

On December 18, 2002, the district court granted plaintiffs' Rule 41(a)(2) motion to dismiss The Housing Authority of New Orleans from the case, conditioned on payment of The Housing Authority of New Orleans's attorneys' fees and costs. In early January 2003, The Housing Authority of New Orleans re-entered the case as an intervenor, to protect interests threatened by plaintiffs' request for an injunction. In March 2003, the district court awarded The Housing Authority of New Orleans $1,800.50 in attorneys' fees, covering those tasks related to the original suit and not useful to The Housing Authority of New Orleans in its role as intervenor. Plaintiffs' final issue on appeal challenges that award.

Rule 41(a)(2) motions for voluntary dismissal are not usually appealable, since it is presumed that plaintiffs obtained that which they sought.[10] *Yoffe v. Keller Indus., Inc.*, 580 F.2d 126, 129 (5th Cir.1978); *see also, Briseno v. Ashcroft*, 291 F.3d 377, 379 (5th Cir.2002); *Mortgage Guar. Ins. Corp. v. Richard Carlyon Co.*, 904 F.2d 298, 300 (5th Cir.1990). Under that rule, district courts have authority to attach conditions to such a dismissal in order to alleviate prejudice to the defendants, but such conditions should be tailored so that they only "alleviate the harm caused to the defendant." *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir.1976). "[The Fifth Circuit has] left open the possibility that a rule 41(a)(2) dismissal with conditions imposed by the district court may constitute legal prejudice and thus render the dismissal appealable." *Briseno*, 291 F.3d at 379 (citing *Yoffe*, 580 F.2d at 129-30). We review conditions placed on a Rule 41(a)(2) motion for voluntary dis-

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[10] Defendants assert that plaintiffs may not appeal the question of attorneys' fees because they were not brought before this court with a timely notice of appeal. Because plaintiffs are not entitled to attorneys' fees even assuming, *arguendo*, that they have timely appealed the issue, we decline to decide the question here.

missal for abuse of discretion. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir.1976).

Appeal may be granted where 1) plaintiff is "legally prejudiced" by the attendant conditions and 2) has not "agreed to or legally acquiesced in those conditions." *Mortgage Guar.*, 904 F.2d at 300 (citing *Yoffe*, 580 F.2d at 130). Legal prejudice arises only where the district court's conditions are " 'clearly unreasonable' or 'so outrageous as to demand a full appellate review.' " *Yoffe*, 580 F.2d at 131; *see also, Mortgage Guar.*, 904 F.2d at 301. Awards of attorneys' fees do not generally reach that level. *See, e.g., Yoffe*, 580 F.2d at 130-31; *Mortgage Guar.*, 904 F.2d at 300- 01 (*Yoffe* precedent makes arguments that such awards cause legal prejudice "difficult to sustain").

Plaintiffs challenge the rationale given for the district court's conditions, arguing that they named The Housing Authority of New Orleans as a defendant because their arguments, in part, challenged an MOA to which the federal defendant, HUD, was not a signatory. The district court, however, correctly noted that plaintiffs' counsel should have been familiar with the fact that the APA "does not provide private plaintiffs a route for reviewing the actions of nonfederal defendants such as [The Housing Authority of New Orleans]." The court notes that plaintiffs' attorneys were also counsel in two other NEPA/NHPA suits where that principle was clearly stated: *Vieux Carre Property Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir.1989) and *Hayne Blvd. Camps Preservation Ass'n, Inc. v. Julich*, 143 F.Supp.2d 628, 631-32 (E.D.La.2001). Fees were awarded to The Housing Authority of New Orleans in the amount of $1,800.50, calculated to cover only those activities The Housing Authority of New Orleans undertook as a defendant, not those occurring after it became an intervenor.

On those facts, the district court's condition did not

create legal prejudice for the plaintiffs: plaintiffs brought suit against both HUD and the Housing Authority of New Orleans, the APA contains no provision that at any time would have given plaintiffs a private cause of action against the Housing Authority of New Orleans, and from past experience, plaintiffs' attorneys should have known that to be the case. Furthermore, the fees awarded were closely tied to the time and effort the Housing Authority of New Orleans had expended in defending itself against those claims. Accordingly, the District Court's award of attorney's fees is not an abuse of discretion.

VII.

For these reasons, we conclude that HUD's decision that an EIS was not required was not arbitrary, capricious, or contrary to law; that no further action is required of the agency at this time under NEPA or the NHLA; and that the district court committed no reversible error in its decisions or its handling of the case. Accordingly, HUD's decision and the judgment of the district court are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 02-2207 Section "N"

COLISEUM SQUARE ASSOCIATION, INC., *et al.*,,
Plaintiffs

v.

SECRETARY MEL MARTINEZ, et al.,
Defendants

March 17, 2004, Decided
March 17, 2004, Filed; March 18, 2004, Entered

ORDER AND REASONS

Before the Court are the following motions: (1) Federal Defendant HUD's Motion to Dismiss, and (2) Plaintiffs' Motion for Summary Judgment. For the reasons that follow, HUD's motion to dismiss is GRANTED. The motion filed by plaintiffs is therefore DISMISSED as moot.

I. BACKGROUND

In 1996, the Housing Authority of New Orleans ("HANO") applied to the United States Department of Housing and Urban Development ("HUD") for a grant to revitalize the St. Thomas Housing Development, a decaying 1,510-unit public housing property in New Orleans. HUD agreed to provide a $ 25 million grant through its HOPE VI program. In addition to obtaining the HUD grant, HANO has brought together state, local, and private funding for the revitalization project (the "Project").

In September 2000, HUD completed an initial review of the Project's impact on historical properties, as required under the *National Historic Preservation Act* ("NHPA"). This review resulted in a Memorandum of Agreement ("MOA") among HANO, the State Historical Preservation Officer ("SHPO"), and the Advisory Council on Historic Preservation ("ACHP"). HUD then reopened the NHPA review in November 2001, after it was announced that a Wal-Mart Superstore would occupy a retail space in the Project. An amended MOA was entered into among HUD, HANO, the SHPO, and ACHP, with the last signatory signing on February 1, 2003. (AR 2617-2636).

In July 2002, the plaintiffs (a group of non-profit organizations, including a local merchant's association and a neighborhood association) filed this suit. The original complaint sought: (1) a declaratory judgment finding that HUD and HANO failed to comply with the NHPA and the *National Environmental Protection Act* ("NEPA"); and (2) an injunction compelling HUD to withhold all HOPE VI funds from HANO until HANO is determined to be in compliance with NEPA and the NHPA. *See* Compl. at PP108-09.

Subsequent to plaintiffs' filing suit, HUD reopened its NEPA review, which previously had resulted in an environmental assessment ("EA") and finding of no significant impact ("FONSI"). While the reopened NHPA and NEPA reviews were still pending, plaintiffs filed a motion for partial summary judgment and permanent injunction. This Court denied the motion on February 27, 2003, finding the plaintiffs' claims to be unripe. (Rec.Doc. 93).

HUD completed its NEPA review on February 20, 2003, (n1) with a final EA and FONSI. (AR 01-13). Upon learning of the new EA and FONSI, plaintiffs filed a motion for temporary restraining order, seeking to prevent the transfer of the Wal-Mart property site to the developer (HRI). (n2) (Rec.Doc. 95). The Court held a status conference, at

which HANO informed the Court that the transfer was scheduled to take place on April 15, 2003. The Court denied the motion for temporary restraining order and set an expedited schedule for production of the administrative record and motion practice. (Rec.Doc. 102).

> (n1) Although HUD had a pending motion before this Court seeking to dismiss plaintiffs' claims as unripe (due to the ongoing reviews), HUD did not inform the Court when it issued the new EA and FONSI. Thus, when the Court issued its ruling on February 27, 2003, staying plaintiffs' claims as unripe, the Court was under the misimpression that the NEPA review was still pending.

> (n2) During the pendency of NEPA and NHPA reviews, HUD had prohibited HANO from transferring title to the property to the developer (HRI), thereby restricting work on the Project to: (1) infrastructure work on the residential portion of the Project; and (2) environmental remediation.

Pursuant to that expedited schedule, HANO filed a Motion for Summary Judgment, seeking dismissal of plaintiffs' Complaint on the grounds that HUD's review of the Project complied with NEPA and NHPA, and that plaintiffs lacked standing. Federal Defendant HUD and intervenor HRI likewise filed their own Motions for Summary Judgment, seeking dismissal of the Complaint based on compliance with NEPA and with NHPA Plaintiffs, in turn, moved for summary judgment, granting the relief requested in their Complaint, and for a permanent injunction stopping all work on the Project until such time as an EIS was completed under NEPA and the Section 106 review was completed under

NHPA. Oral argument was set for and held on April 10, 2003.

After the motions were filed and before the Court ruled, plaintiffs filed a Second Supplemental and Amending Complaint, which largely reiterated the claims originally made, simply having added the new EA and FONSI and the amended MOA to the original agency findings. (Rec.Doc. 109).

The Court ruled on the motions on April 11, 2003. The Court denied the plaintiffs' Motion for Summary Judgment and Permanent Injunction. In ruling on HUD's Cross Motion for Summary Judgment, the Court granted the Motion in part, dismissing plaintiffs' claims under NHPA and plaintiffs' claims under NEPA insofar as they related to the February 20, 2003 EA/FONSI, and denied the Motion in part, on the issue of mootness. n3 The Court thereafter denied as moot the Motions for Summary Judgment filed by HANO and by HRI.

(n3) In denying HUD's Motion in part, the Court found that genuine issues did exist concerning the plaintiffs' potential recovery of attorneys' fees as a "prevailing party" and the application of the "catalyst theory" to the facts. *See* Rec.Doc. 127 at p. 10 (the Court is "unconvinced... that HUD is entitled to judgment as a matter of law dismissing plaintiffs' claim for attorneys' fees as it relates to the original EA/FONSI"). At the time the Court rendered Judgment, however, the Court did not have before it any arguments advanced by defendants regarding the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001)*. In *Buckhannon,* the Supreme

Court explicitly rejected the catalyst theory as a basis for the recovery of attorneys' fees as a "prevailing party" under the Fair Housing Amendments Act ("FHAA"), *42 U.S.C. § 3601, et seq.*, and the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101, et seq.*

II. LAW AND ANALYSIS

HUD presently asks this Court to find that "there is no case or controversy with regard to Plaintiff's challenge to the original EA/FONSI" and to issue an Order, pursuant to *Fed. R. Civ. P. 12(b)(1)*, dismissing Plaintiffs' action in its entirety. (Rec. Doc. 171 at p. 1). Plaintiffs argue that the original MOA and the original EA/FONSI were inadequate ; that a live case or controversy does exist; and that the doctrine of "capable of repetition yet evading review" precludes dismissal of plaintiffs' Complaint.

A. Standing:

This Court set forth the applicable law governing standing in its February 27, 2003 ruling, and will not reiterate it here. (Rec.Doc. 93). In that ruling, the Court held that two of the plaintiffs (Coliseum Square Association and Historic Magazine Row Association) had satisfied the requisites of representational standing at the time of their filing the Complaint(s).

B. Mootness

To sustain jurisdiction in the instant matter, it is not enough that a dispute was alive when suit was filed; instead, "an actual controversy must be extant at all stages of review." *Preiser v. Newkirk, 422 U.S. 395, 402-403, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975).* Stated otherwise, "'the requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Dailey v. Vought Aircraft Co., 141 F.3d 224,*

227 (5th Cir. 1998) (quoting *United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980)).* "Under [the mootness] doctrine, although a justiciable controversy may have existed at the time litigation was commenced, the action must be dismissed for want of jurisdiction if the controversy ceases to exist at some point in the litigation." *Dailey, 141 F.3d at 227.*

"A case may become moot for several reasons;" one such reason is an intervening factual event. *Id.* "A case is not moot, though, only because a defendant voluntarily ceases the allegedly improper behavior that is the subject of the lawsuit." *Christian Coalition of Ala. v. Cole, 355 F.3d 1288, 2004 WL 34832 *2 (11th Cir.). See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).* "Only when the defendant can demonstrate there is no reasonable expectation that the wrong will be repeated are federal courts precluded from deciding the case on mootness grounds." *Christian Coalition, 355 F.3d 1288, 2004 WL 34832 *2* (internal quotations omitted). *See also Laidlaw, 528 U.S. at 189.* The party asserting the mootness - here, HUD - has the "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again. *Laidlaw, 528 U.S. at 189.*

1. NHPA

In the April 11, 2003 decision, the Court granted summary judgment in favor of HUD with regard to plaintiffs' NHPA claims. (Rec.Doc. 127). The Court determined that "plaintiffs ... failed to demonstrate any genuine issue of fact and that HUD is entitled to judgment as a matter of law *dismissing plaintiffs' NHPA claims."* (Rec.Doc. 127, pp. 5-6) (emphasis added). Plaintiffs therefore have no NHPA claims remaining to adjudicate. For the Court to now reconsider plaintiffs' NHPA claims based on the original MOA would violate the "law of the case" doctrine. n4 *See Office of Thrift Supervision v. Felt (In re Felt), 255 F.3d 220, 225, cert. de-*

nied, Felt v. Office of Thrift Supervision, 534 U.S. 1078, 151 L. Ed. 2d 693, 122 S. Ct. 807 (2002).

> (n4) "Under the 'law of the case' doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *F.D.I.C. v. McFarland, 243 F.3d 876, 884 (5th Cir. 2001)* (citations and quotations omitted). "This doctrine applies regardless of whether the issue was decided expressly or by necessary implication." *Id.*

2. NEPA

The NEPA violations, according to plaintiffs, concern alleged inadequacies and procedural defects in the original and supplemental EA/FONSI, as well as the addition of the Wal-Mart Superstore to the Project, prior to the preparation of a Supplemental EA and FONSI (or EIS, if so required). *See* Compl. at P32.

On April 11, 2003, the Court upheld the Supplemental EA/FONSI as legally sufficient. "In dismissing plaintiffs' NEPA claims insofar as they relate to the February 20, 2003 EA and FONSI" (Rec.Doc.127 at p. 9), the Court found that a review of the administrative record revealed "that HUD did evaluate the issues raised by the plaintiffs, including: potential impacts of noise, vibration, lead, drainage, and increased traffic; issues of environmental justice; potential impacts on historic properties; potential economic impact; local zoning laws; and alternatives to the Project." (Rec.Doc.127 at p. 8).

By effect of the April 11, 2003 partial dismissal, the only claims of plaintiffs that remained were those relative to the original EA/FONSI. However, in that same Order, the Court stated that "the relief for remedying a deficiency in the original EA/FONSI deficient [*sic*] is now moot." (Rec.Doc. 127 at p.10). Nevertheless, the Court denied, in part, HUD's

Motion for Summary Judgment on the issue of mootness, as the Court was "unconvinced... that HUD is entitled to judgment as a matter of law dismissing plaintiffs' claim for attorneys' fees as it relates to the original EA/FONSI." *Id.*

HUD now asserts the argument that logically follows, *i.e.,* that because the plaintiffs effectively have received the relief they sought in bringing their NEPA challenge with regard to HUD's original EA/FONSI, there no longer exists a live case or controversy, and without such a dispute, this Court no longer has jurisdiction over the matter.

In opposing HUD's motion, plaintiffs argue that Federal Defendant HUD has not met its "heavy burden of persuading the court that the challenged conduct cannot be reasonably expected to start up again." Plaintiffs also argue that the instant matter falls within the "capable of repetition, yet evading review" exception to mootness.

In their first argument - that HUD has not met its burden, the plaintiffs rely heavily on a *Clean Water Act* case, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).* In *Laidlaw,* the Supreme Court granted certiorari to address the Fourth Circuit's decision that a citizen suit plaintiff's claim for civil penalties must be dismissed when the defendant - after initiation of the litigation - had come into voluntary compliance with its permit. *Laidlaw,* (n5), *528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693* The Court found that the Fourth Circuit had erred by conflating Supreme Court caselaw on standing and mootness, and reasserted that a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. *Id. at 173-174.* Specifically, in its discussion of mootness, the Court noted that the case might become moot if Laidlaw's voluntary compliance with its permit or closure of the wastewater treatment facility "made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur." *Id. at 193.* The Court remanded to allow the lower

court to consider the disputed facts of "the effect of both Laidlaw's compliance and the facility closure on the prospect of future violations...." *Id.* This remand was necessary, even in light of the asserted closure of the facility, in part because Laidlaw had retained its NPDES permit. *Id. at 194.*

> (n5) In *Laidlaw,* the district court had denied injunctive relief. The only issue, therefore, was the mootness of the civil penalties, awarded by the district court in order to deter Laidlaw from violating the *Clean Water Act. Laidlaw, 528 U.S. at 193.*

In this case, however, there is no reasonable expectation of HUD's resuming the challenged activity. This is not a case like *Laidlaw,* where the defendant retained a NPDES permit; where the court had found numerous violations of that permit; and where statutory civil penalties were available to deter future violations. Here, HUD supplemented the original EA/FONSI to review in greater detail the effect the Project, including the Wal-Mart Superstore will have on the environment. HUD's decision to move forward with the Project is based on the February 20, 2003 EA and FONSI, which this Court has determined to be procedurally adequate. While any actions taken in the time period between the Original EA/FONSI and Supplemental EA/FONSI may not be palatable to the plaintiffs, nonetheless, any such actions fall within the scope of the Supplemental EA/FONSI.

In addition, plaintiffs argue that the dispute falls within the "capable of repetition, yet evading review" exception to the mootness doctrine, and that the suit therefore remains justiciable. Plaintiffs' contention is flawed, however. Because this exception to the mootness doctrine "permits suits for prospective relief to go forward despite abatement of the underlying injury," it is found only in "exceptional

situations." *Lewis v. Continental Bank Corp., 494 U.S. 472, 481, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)* (citing *Los Angeles v. Lyons, 461 U.S. 95, 109, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983))*. Such "exceptional situations" exist only where the following circumstances are simultaneously present: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lewis, 494 U.S. at 481* (quoting *Murphy v. Hunt, 455 U.S. 478, 482, 71 L. Ed. 2d 353, 102 S. Ct. 1181 (1982) (per curiam)* (quotation omitted). Neither of these requirements is satisfied here.

Plaintiffs erroneously rely on *Super Tire Engineering Company v. McCorkle, 416 U.S. 115, 125, 40 L. Ed. 2d 1, 94 S. Ct. 1694 (1974)* to support their position that the requested declaratory relief pertaining on the original EA/FONSI falls within the exception and is not moot. In *Super Tire,* the petitioner employer was engaged in cyclically recurring bargaining with the union representing its employees, and the respondent state official was continuously following a policy of paying unemployment compensation benefits to strikers. Even though the particular strike which had been the occasion for the filing of the lawsuit was terminated, the Court held that it was enough that the petitioner employer showed "the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *416 U.S. at 125-26.* The Court further noted that "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender." *Id. at 126. See accord Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)* and *Doe v. Bolton, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)* (the pregnant appellants had long since outlasted their pregnancies by the time their cases reached the Supreme

Court, yet the Court had no difficulty rejecting suggestions of mootness); *Storer v. Brown, 415 U.S. 724, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974)* and *Rosario v. Rockefeller, 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973)* (cases concerning various challenges to state election laws).

By attaching the affidavits of John Wettermark and Elizabeth Marshal Stout, plaintiffs seek to illustrate to this Court that the defendants plan other additions (n6) to the project which were not subject to the NEPA review process. Hence, plaintiffs claim entitlement to declaratory relief even in the current posture of this case because defendants are allegedly failing to comply with those legal requirements. Plaintiffs therefore urge that indeed defendants' conduct falls within the scope of the "capable of repetition" exception in that defendants are shirking their responsibilities under NEPA with regard to the new aspects described in the Wettermark and Stout affidavits. This, however, is an extraordinarily broad reading of the "capable of repetition, yet evading review" exception to the mootness doctrine.

(n6) The alleged proposal added 50,000 to 60,000 square feet of additional retail space and a 30,000 square foot YMCA facility.

First of all, were defendants to choose a project significantly different from that subject to the February 20, 2003 review, by definition this would not be a "repetition" of the prior plan. (n7) The specific project which was the subject of the February 20, 2003 review has been and will henceforth be subject to the February 20, 2003 NEPA review, which this Court has found to be legally sufficient. A "new" project would, perhaps, raise questions as to compliance with NEPA, to the extent those laws are applicable to the new plan, but surely would not be a "repetition" of commencement of the existing project.

(n7) *Cf. Vieux Carre Property Owners, Residents and Assocs. v. Brown, 948 F.2d 1436, 1447-48 (5th Cir. 1991)* (finding that plaintiffs met repetition prong of "capable of repetition, yet evading review" exception, as the "expectation of future development of the riverfront park on other wharfs of the MS River in the historic district makes the alleged harm to [plaintiffs] capable of repetition."). Unlike the case sub judice, *Vieux Carre* involved the "unique situation where the *absence of review* by the appropriate government agency made uncertain the mooting affect of substantially completed construction." *Benavides v. Housing Auth. of City of San Antonio, 238 F.3d 667, 670 (5th Cir. 2001)* (emphasis added). *Cf. also Missouri Coalition for the Env't. v. Corps of Eng'rs of the U.S. Army, 866 F.2d 1025, 1029-30 (8th Cir. 1989), cert. denied, 493 U.S. 820, 107 L. Ed. 2d 42, 110 S. Ct. 76 (1989),* a case dissimilar factually and procedurally from the case subjudice.

Unlike the entity allegedly contaminating water in *Laidlaw,* or the state's alleged use of public funds to benefit striking workers in *Super Tire Engineedring Company,* HUD and HANO logically cannot again create the same project which was the subject of the February 20, 2003 NEPA review, and now embark upon it without complying with NEPA. Quite simply, plaintiffs' complaint about other plans or portions of projects, or proposed additions to the existing project, are not "repetitions", but rather raise new issues not part of the project as it existed on February 20, 2003, not presently before the Court, and thus not a repetition of conduct placed at issue before the Court as part of this litigation. The potential, or even anticipated, future violation of the same laws by the defendants in other respects does not, in

itself, invoke the "capable of repetition, yet evading review" exception.

As a further note, the Court finds that the failure to supplement an EA is not the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely forever to evade review. *Cf., Alaska Fish & Wildlife Fed'n v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987), cert. denied, 485 U.S. 988, 99 L. Ed. 2d 501, 108 S. Ct. 1290 (1988)* (action not moot as "regulation challenged was in effect for less than one year, making it difficult to obtain effective judicial review."). If plaintiffs deem that a change in the Project is major and requires the preparation of a supplemental EA, there will be ample time to obtain judicial review of the assessment.

Because the Court today finds that plaintiffs' remaining NEPA claims, if any, have been rendered moot and do not fall within any exception to the mootness doctrine, there is no longer a dispute, or live case or controversy, for the Court to decide. Without a live case or controversy, the limitation on this Court's Article III powers is invoked. Therefore, Federal Defendant HUD is entitled to judgment as a matter of law, dismissing plaintiffs' Complaint, insofar as it relates to the NEPA claims.

3. Attorneys' Fees

The Court has acknowledged that there also remains the issue of whether plaintiffs are entitled to recover attorneys' fees under the Equal Access to Justice Act, *28 U.S.C. § 2412, et seq.* ("EAJA"), for prompting HUD to reopen its NEPA review. (Rec.Doc. 127 at p. 10). Plaintiffs' EAJA claim, however, cannot serve as the basis to create a live case or controversy with regard to HUD's original EA/FONSI. *See generally Lewis v. Continental Bank Corp., 494 U.S. 472, 481, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)* (an "in-

terest in attorney's fees is... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." (citation omitted)). Rather, any claim for attorneys' fees is collateral to plaintiffs' underlying merits claim. *See FCC v. League of Women Voters, 468 U.S. 364, 373-74, n. 10, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)*; *Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202-203, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988)*. Because the Court today is dismissing all of plaintiffs' underlying claims, plaintiffs' entitlement to attorneys' fees, if any, will not preclude a finding of mootness in the instant matter.

While plaintiffs have not filed a motion for attorneys' fees, the Court finds it necessary to address arguments advanced by defendants which suggest that current caselaw precludes any award of attorneys' fees in the instant matter.

The Court agrees with the defendants in that the only theory under which plaintiffs could potentially argue that they are a "prevailing party" (n8) for the purpose of recovering attorneys' fees would be the "catalyst theory," which provides that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. *See generally Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001)*. However, the Supreme Court in *Buckhannon* explicitly rejected the catalyst theory. *See id. at 605*. Specifically, the Court held:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents... counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. Although petitioners in *Buckhannon* requested attorneys' fees as the "prevailing party" under the Fair Housing Amendments Act ("FHAA"), *42 U.S.C. § 3601, et seq.*, and the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101, et seq.*, the *Buckhannon* holding applies with equal force to cases in which attorneys' fees are sought under NEPA through the Equal Access to Justice Act ("EAJA"), *28 U.S.C. § 2412, et seq. See, e.g., N.C. Alliance for Transp. Reform, Inc. v. United States DOT, 151 F. Supp. 2d 661, 673 n.11 (M.D.N.C. 2001).*

> (n8) *Title 28 of the United States Code, Section 2412* provides, in pertinent part, that a "court may award reasonable fees and expenses of attorneys ... to the *prevailing party* in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity...." (Emphasis added).

While HUD did re-open its review process subsequent to plaintiffs' filing suit, there is no action taken by this Court whereby plaintiffs could be considered a "prevailing party" for purposes of the EAJA. n9 Therefore, in light of this Court's dismissal of the Complaint in its entirety and in accordance with the *Buckhannon* decision, no basis exists for plaintiffs to seek attorneys' fees in this matter.

> (n9) Notably, plaintiffs have admitted that, under *Buckhannon*, a ruling "in HUD's favor on the Motion to Dismiss... would preclude any attorney fees application by plaintiffs." (Rec.Doc. 178 at p. 1).

III. CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that:

(1) Federal Defendant's (HUD's) Motion to Dismiss is **GRANTED,** dismissing plaintiffs' claims; and

(2) Plaintiffs' Motion for Summary Judgment is **DISMISSED** as moot.

New Orleans, Louisiana, this 17th day of March 2004.

KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 02-2207 Section "N"

COLISEUM SQUARE ASSOCIATION, INC., *et al.*,,
Plaintiffs

v.

SECRETARY MEL MARTINEZ, et al.,
Defendants

Entered and Filed on April 11, 2003

ORDER AND REASONS

Before the Court are the following motions: (1) Plaintiffs' Motion for Summary Judgment and Permanent Injunction; (2) Federal Defendant's (HUD's) Cross Motion for Summary Judgment; (3) HANO's Motion for Summary Judgment; and (4) a Cross Motion for Summary Judgment by intervenor, Historic Restoration, Incorporated (HRI). For the reasons that follow, plaintiff's motion is DENIED, and HUD's motion for summary judgment is GRANTED in part and DENIED in part. The motions filed by HANO and HRI[11] are therefore moot.

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[11] HANO and HRI appear before the Court in the posture of intervenors pursuant to Fed.R.Civ.P. 24. Their interests are aligned with those of defendant HUD. Plaintiffs assert no claim against these parties.

I. BACKGROUND

In 1996, the Housing Authority of New Orleans ("HANO") applied to the United States Department of Housing and Urban Development ("HUD") for a grant to revitalize the St. Thomas Housing Development, a decaying 1,5 10-unit public housing property in New Orleans. HUD agreed to provide a $25 million grant through its HOPE VI program. In addition to obtaining the HUD grant, HANO has brought together state, local, and private funding for the revitalization project (the "Project").

In September 2000, HUD completed an initial review of the Project's impact on historical properties, as required under the National Historic Preservation Act ("NHPA"). This review resulted in a Memorandum of Agreement ("MOA) among HANO, the State Historical Preservation Officer ("SHPO"), and the Advisory Council on Historic Preservation ("ACHP"). HUD then reopened the NHPA review in November 2001, after it was announced that a Wal-Mart Superstore would occupy a retail space in the Project. An amended MOA was entered into among HUD, HANO, the SHPO, and ACHP, with the last signatory signing on February 1, 2003. (AR 26 17-2636).

On July 19, 2002, the plaintiffs (a group of non-profit organizations, including a local merchant's association and a neighborhood association) filed this suit. The original complaint sought: (1) a declaratory judgment finding that HUD and HANO have failed to comply with the NHPA and the National Environmental Protection Act ("NEPA"); and (2) an injunction compelling HUD to withhold all HOPE VI funds from HANO until HANO is determined to be in compliance with NEPA and the NHPA. See Compl. at ¶¶ 108-09.

Subsequent to plaintiffs' filing suit, HUD reopened its NEPA review, which previously had resulted in an environ-

mental assessment ("EA") and finding of no significant impact ("FONSI"). While the reopened NHPA and NEPA reviews were still pending, plaintiffs filed a motion for partial summary judgment and permanent injunction. This Court denied the motion on February 27, 2003, finding the plaintiffs' claims to be unripe. (Rec.Doc. 93).

HUD completed its re-opened NEPA review on February 20, 2003,[12] with a final EA and FONSI. (AR 01-13). Upon learning of the new EA and FONSI, plaintiffs filed a motion for temporary restraining order, seeking to prevent the transfer of the Wal-Mart property site to the developer (HRI).[13] (Rec.Doc.95). The Court held a status conference, at which HANO informed the Court that the transfer is scheduled to take place on April 15, 2003. The Court denied the motion for temporary restraining order and set an expedited schedule for production of the administrative record and motion practice. (Rec.Doc. 102). The instant motions were filed pursuant to this expedited schedule.

Plaintiffs have filed a Second Supplemental and Amending Complaint, which largely reiterates the claims originally made, simply adding the new EA and FONSI and the amended MOA to the original agency findings. (Rec.Doc. 109).

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[12] Although HUD had a pending motion before this Court seeking to dismiss plaintiffs' claims as unripe (due to the ongoing reviews), HUD did not inform the Court when it issued the new EA and FONSI. Thus, when the Court issued its ruling on February 27, 2003, staying plaintiffs' claims as unripe, the Court was under the misimpression that the NEPA review was still pending.

[13] During the pendency of NEPA and NHPA reviews, HUD had prohibited HANO from transferring title to the property to the developer (HRI), thereby restricting work on the Project to: (1) infrastructure work on the residential portion of the Project; and (2) environmental remediation.

II. LAW AND ANALYSIS

Plaintiffs ask the Court to "issue a Permanent Injunction which stops all work on the project until such time as an EIS [Environmental Impact Statement] is complete under NEPA and the Section 106 review is complete under NHPA." See Rec. Doc. 117 at p.41. HUD argues that the MOA and its EA and FONSI are supported by the administrative record and that plaintiffs' claims should be dismissed.

A. Standing:

This Court set forth the applicable law governing standing in its February 27, 2003 ruling, and thus need not reiterate it here. (Rec.Doc. 93). In that ruling, the Court held that two of the plaintiffs (Coliseum Square Association and Historic Magazine Row Association) had satisfied the requisites of representational standing. The intervenors argue that the plaintiffs have failed to support their standing with sufficient evidence of particularized injury to survive the summary judgment motions before the Court. The Court disagrees. The record contains affidavits demonstrating that Coliseum Square Association, Inc., Smart Growth for Louisiana, Inc., Historic Magazine Row Association, and The Urban Conservancy, Inc. either have an office located in the Lower Garden District or have members who live and/or own businesses in the Lower Garden District. See Pl. Opp. Memo to Mtn. to Dismiss (Rec.Doc.76), Exh. A & D; Pl. Opp. Memo to Procedural Defenses (Rec.Doc. 123), Exh. C & D. The record contains evidence that a member of Louisiana Landmarks Society, Inc. lives on the 1400 block of Jackson Avenue. (Rec.Doc. 123, Exh. B.) The Lower Garden District has a very close geographical proximity to the Project site. Moreover, the administrative record reflects that traffic will increase on Felicity Street (which runs directly through the Lower Garden District) and Jackson Avenue. The Court finds this evidence sufficient to demonstrate a par-

ticularized, nonconjectural injury on the part of each plaintiff.

B. NHPA:

Section 106 of the National Historic Preservation Act ("NHPA") requires a federal agency to "take into account the effect of [any] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The agency also must give the Advisory Council on Historic Preservation (the "Council") a "reasonable opportunity to comment with regard to such undertaking." *Id.* In consultation with the State Historic Preservation Officer ("SHPO") (the official responsible for representing the interests of the State and its citizens), the agency must make "a reasonable and good faith effort" to identify historic properties that may be affected by the undertaking and gather information to assess the adverse effects, if any, of the project on such properties. See 36 C.F.R. § 800.4. Where, as here, an adverse effect is found, the agency must consult further to resolve the effect by developing modifications or alternatives designed to avoid, minimize, or mitigate the adverse effects, in accordance with the procedure set out in 36 C.F.R. § 800.6. See 36 C.F.R. § 800.5(d). If the agency, the SHPO, and the Council "agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement." 36 C.F.R. § 800.6(b)(2). "A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its part." 36 C.F.R. § 800.6(c).

Here, the agency, the SHPO, and the Council did agree on how the adverse effects would be resolved and did execute an amended memorandum of agreement, as required under the implementing regulations. (AR 26 17-2636). Moreover, the administrative record is replete with evidence demonstrating the complex and public consulting process

that accompanied the section 106 review. Indeed, all but one of the plaintiffs were consulting parties to this process. They obviously are displeased with the outcome of this process. However, the MOA is adequately supported by the administrative record and demonstrates compliance with the NHPA and the regulations implementing it. The Court is unable to find HUD's decision to be arbitrary and capricious or otherwise not in accordance with law.[14] Accordingly, the Court finds that plaintiffs have failed to demonstrate any genuine issue of fact and that HUD is entitled to judgment as a matter of law dismissing plaintiffs' NHPA claims.

C. NEPA:

NEPA is a "procedural statute." *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994). It "does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a 'hard look at environmental consequences.'" *Id.* (quoting *Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669 (5th Cir.), cert. denied, 506 U.S. 823 (1992)). Agencies comply with NEPA by preparing an environmental assessment ("EA) of the project in question and/or an environmental impact statement ("EIS"). An EA "is prepared in order to determine whether an EIS is required." *Espy*, 38 F.3d at 802. It is "a 'rough-cut, low-budget environmental impact statement' intended to determine whether environmental effects are significant enough to warrant

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[14] Pursuant to the Administrative Procedure Act ("APA"), judicial review of an agency's decision "is usually limited to determining whether agency action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *United States v. Bean*, 123 S. Ct. 584,587-88 (2002) (quoting 5 U.S.C. § 706(2)(A)). Plaintiffs' brief can be read to argue that the AF'A's arbitrary and capricious standard does not apply in reviewing an agency's actions under the NHPA. At oral argument, however, counsel clarified that plaintiffs' statements were directly solely at the lack of discretion due to HUD in interpreting the regulations implementing the NHPA.

preparation of an EIS." *Id.* (quoting *Sabine*, 951 F.2d at 676). "The EA will come to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact (a "FONSI") necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS." *Sabine*, 951 F.2d at 677. The determination of whether an environmental impact is significant entails consideration of two factors: context and intensity. 40 C.F.R. § 1508.27.

An agency's decision to forego an EIS is reviewed under the "arbitrary and capricious" standard. See *Sabine*, 951 F.2d at 677.[15] "Under this highly deferential standard of review, a reviewing court has the 'least latitude in finding grounds for reversal.'" *Id.* at 678 (quoting *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533,1538 (11th Cir. 1990)). The Court "may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Id.* "Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence." *Id.* "The agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion." *Id.* Under such circumstances, the reviewing court "must show the proper respect for an agency's reasoned conclusion

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[15] Before Sabine, the Fifth Circuit instructed courts reviewing agency decisions under NEPA to "apply the moderately deferential 'reasonableness' standard -rather than the highly deferential 'arbitrary and capricious' standard adopted by other circuits-in reviewing an agency's decision to forego an EIS." *Sabine*, 951 F.2d at 677 (citing *Fritiofson v. Alexander*, 772 F.2d 1125, 1237 (5th. Cir. 1985)). In *Sabine*, however, the Fifth Circuit concluded that its prior precedent (e.g., *Fritiofson*) has been undercut by the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). Id. at 677- 78.

even if the reviewing court finds the opinions of other experts equally or more persuasive." *Id.*

Plaintiffs first argue that HUD's decision is inadequate under NEPA because HUD did not adequately consider: (1) adverse impact from traffic, noise, vibration, lead, or drainage; (2) adverse impacts on historic districts; (3) adverse economic impact; (4) issues of environmental justice; (5) alternatives to the Project; or (6) local zoning laws.

Having reviewed the administrative record, the Court is unable to find HUD's February 20, 2003 EA and FONSI arbitrary and/or capricious in any respect. Contrary to plaintiffs' assertions, the administrative record reveals that HUD did evaluate the issues raised by the plaintiffs, including: potential impacts of noise, vibration, lead, drainage, and increased traffic[16] issues of environmental justice[17]; potential impacts on historic properties[18]; potential economic impact[19]; local zoning laws[20]; and alternatives to the Project.[21] Although HUD relied on experts with whom plaintiffs disagree, and reached conclusions that conflict with the plain-

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[16] See, e.g., Study by Urban System, Inc. (AR 5941 -5958) (concluding that streets in the affected area (including Jackson Avenue and Felicity Street) are under-utilized and will continue to be under-utilized after the Project is complete); Supplemental Traffic Analysis by Urban System, Inc. (AR 6465-6472) (concluding that the impact of the Project on area intersections will not be significant); Report of Delta Testing and Inspection, Inc. (concluding that seismic readings along Jackson Avenue are within safe limits).

[17] See Report of C-K Associates, Inc. (AR 1027-1052) (finding net positive effect on the minority and low-income population).

[18] See, e.g., AR 2643-49, 2699-2713.

[19] See, e.g., AR 2647.

[20] See Ordinance (Dec. 6,2001) waiving certain zoning regulations. (AR 829-833).

[21] See, e.g., AR 1367-69.

tiffs' opinions, these are not valid grounds for vacating HUD's decision.

Plaintiffs also argue that HUD's own regulations require an EIS because the Project would "remove ... 2,500 or more existing housing units ..., or would result in the construction or installation of 2,500 or more housing units." See 24 C.F.R. § 50.42. The Court disagrees. The regulation plainly states that an EIS "normally" is required if a project would "remove ... 2,500 or more existing housing units ..., would result in the construction or installation of 2,500 or more housing units." 24 C.F.R. § 50.42 (emphasis added). The Project here calls for the removal of 1520 units and the construction of 1248 units. Both numbers fall far short of HUD's presumptive threshold. Plaintiffs argue that the number of units demolished should be added to the number of units to be constructed. The Court agrees with HUD that plaintiffs' reading is contrary to the plain language of the regulation, even when read in light of 24 C.F.R. § 50.21, as plaintiffs argue it should be.[22] Were the number of previous units added to the number of proposed units, as plaintiffs contend, the regulatory threshold would be significantly different than that clearly intended and expressed in the regulation.

Given the context of the Project, the Court does not find HUD's findings regarding the severity of potential environment impacts to be without basis in the record. Nor does the Court find HUD's decision to forego an EIS to be in any respect arbitrary, capricious, or otherwise contrary to law. Accordingly, the Court finds that plaintiffs have failed to demonstrate any genuine issues of fact and that HUD is entitled to judgment as a matter of law dismissing plaintiffs'

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[22] Section 50.21 provides: "Activities which are geographically related and are logical parts of a composite of contemplated HUD projects shall be evaluated together." 24 C.F.R. § 50.21.

NEPA claims insofar as they relate to the February 20, 2003 EA and FONSI.

D. Mootness:

Plaintiffs' amending complaints continue to assert complaints regarding the original EA and FONSI.[23] HUD argues that it would serve no purpose to litigate the efficacy of the original EA/FONSI and that plaintiffs' claims attacking it are consequently moot. The Court is unconvinced based on the briefs filed to date that matter is wholly devoid of a live, justiciable issue. It is true that the relief for remedying a deficiency in the original EA/FONSI deficient is now moot.[24] However, plaintiffs have asserted a claim for attorneys' fees which maybe justiciable despite the Court's ruling on the newly-issued EA/FONSI, particularly if it is shown that plaintiffs' initially-filed lawsuit prompted HUD to reopen its NEPA review. Accordingly, the Court is unconvinced at this juncture that HUD is entitled to judgment as a matter of law dismissing plaintiffs' claim for attorneys fees as it relates to the original EA/FONSI.

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[23] At oral argument, plaintiffs' counsel largely conceded that the original MOA has been superceded, but continued to argue that the original EA and FONSI were final agency actions, which are justiciable separate and apart from the new EA and FONSI addressed earlier in this opinion.

[24] The ordinary remedy for unsustainable agency findings under NEPA is to remand the matter to the agency "for further consideration." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519,549 (1978); see also *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case--even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."). Here, HUD undertook such further consideration without being ordered to do so (albeit after plaintiffs' initially-filed suit), and the Court has determined these subsequent efforts to satisfy NEPA.

III.CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that: (1) plaintiffs' Motion for Summary Judgment and Permanent Injunction **is DENIED**; (2) Federal Defendant's (HUD's) Cross Motion for Summary Judgment is **GRANTED IN PART**, in that HUD is entitled to judgment dismissing plaintiffs' claims under the NHPA and plaintiffs' claims under NEPA insofar as they relate to the February 20, 2003 EA/FONSI, and **DENIED IN PART**, in that it is denied on the issue of mootness; and (3) HANO's Motion for Summary Judgment and the Cross Motion for Summary Judgment filed by intervenor HRI are denied as moot.

New Orleans, Louisiana, this 11th day of April, 2003.

/s/
KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30875

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION, and
URBAN CONSERVANCY INC.,
Plaintiffs-Appellants

v.

ALPHONSO JACKSON, ETC., et al,
Defendants

ALPHONSO JACKSON, Acting Secretary
United States Department of Housing & Urban Development
and
HOUSING AUTHORITY OF NEW ORLEANS,
Defendants-Appellees

No. 04-30522

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION, and
URBAN CONSERVANCY INC.,
Plaintiffs-Appellants

v.

ALPHONSO JACKSON, Acting Secretary
United States Department of Housing & Urban Development
and

HOUSING AUTHORITY OF NEW ORLEANS,
an agency of the State of Louisiana,
Defendants-Appellees

v.

HISTORIC RESTORATION, INC.,
Intervenor - Apellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

December 13, 2006

ON PETITION FOR REHEARING

Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is **DENIED**.

ENTERED FOR THE COURT

___/s/_____
United States Circuit Judge

APPENDIX E

UNITED STATES DEPARTMENT OF HOUSING and URBAN DEVELOPMENT

ENVIRONMENTAL ASSESSMENT AND COMPLIANCE FINDINGS FOR THE RELATED LAWS

An executed copy of the Department of Housing & Urban Development's finding of no significant impact form is on file with the Clerk of the United States Supreme Court.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the National Environmental Policy Act are codified at 42 U.S.C. §§ 4321 *et seq.* as follows:

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality estab-

lished by subchapter II of this chapter, which will insure that presently un-quantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which in-

volves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

APPENDIX G

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations governing all federal agencies are printed at 49 C.F.R. §§ 1500 *et seq.* as follows:

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub.L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C)(environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and area wide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1508.13 Finding of no significant impact.

"Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLANTS' RECORD EXCERPTS

TRANSCRIPT OF COMMENTS MADE BY JOHN WETTERMARK TO SECTION 106 MEETING HELD AT HANO, 4100 TOURO STREET, NEW ORLEANS, LA ON OCTOBER 14, 2002 (ATTACHED TO JANUARY 24, 2003 AFFIDAVIT OF JOHN WETTERMARK).

Page 74

I'm glad that the introduction of incompatible visual elements was brought up in the findings, because in the store design it needs to be noted that while, as an architect I don't think it is that important, the skin of the building when you have something of this size, but it's been sold to the public that

Page 75

yes, this will compatible with the area because it's going to be made out of the brick like the surrounding historic buildings. If you look at the elevations there, over 75 percent of the building is concrete block. There's a generic tern for it smooth face CMU, integral color. CMU is concrete masonry unit. And I hope there's not an argument made that concrete block equals brick. It does not.

And, again, visually compatible material. There is a reasoning in there that the size of the building is compatible with because there are other -- it's reasoned that there are other large buildings that were in there. It doesn't give any rational along the

same lines for the 850 space parking lot which covers more than a block. Where is the argument that there are other parking lots of that size in this neighborhood or anywhere in uptown New Orleans. Thank you.

LAMBERT ADVISORY COUNSEL LC, *ST. THOMAS HOPE VI & WAL-MART EVALUATION* 7-8 (DRAFT APRIL 11, 2002).

As Wal-Mart's insistence with maintaining a parking lot sized beyond what the City zoning code allows shows, parking is a critical element of successful retail in all but the most unique cases (the French Quarter of New Orleans being one example). There is a question of fairness to other City of New Orleans businesses in granting Wal-Mart's request to extend its parking allowance, particularly those businesses within retail corridors such a Magazine Street where it is impossible for individual retailers to provide for the parking needs of their customers. This is particularly important for higher volume tenants such as restaurants. However, rather than simply deny the Wal-Mart request for expanded parking, we suggest that a parking needs assessment be completed for key retail corridors in the City. The second phase of our study will explore how other cities have used TIF to improve parking in key retail districts.

LETTERS FROM THE NATIONAL PARK SERVICE TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

United States Department of the Interior

NATIONAL PARK SERVICE
Southeast Regional Office
Atlanta Federal Center
1924 Building
100 Alabama St., S.W.
Atlanta, Georgia 30303

IN REPLY REFER TO:

NOV. 18, 2002

Mr. David G. Blick
Historic Preservation Specialist
U.S. Department of Housing and Urban Development
Office of Community Planning and Development
451 Seventh Street, SW – Room 7244
Washington, DC 20410

Dear Mr. Blick:

This office has been asked to clarify the National Park Service (NPS) position on the possible impact of the St. Thomas HOPE VI project in New Orleans on National Historic Landmarks (NHL) in the project's "Area of Potential Effect." We have attempted to examine this matter, but find that our files contain insufficient information to allow us to clarify the position stated previously by this office. Recent discussions with various parties about the project history have provided conflicting information. Without additional documentation, we can not clarify the reasoning for the pre-

vious NPS decision We understand that an amended Memorandum of Agreement (MOA) will be signed tomorrow, November 19, 2002, which does not allow sufficient time to investigate this matter.

We request that the signing of the MOA be delayed to provide this office time to respond adequately on the project's impacts on National Historic Landmarks. We hope that you will not proceed with an MOA at this time on the basis of previous NPS correspondence that is assumed to serve as clearance for NHLs in the project's "Area of Potential Effects." We regret that we must request this delay at the eleventh hour, but National Historic Landmarks are considered to be the most important historic properties in the United States. They are national treasures worthy of extra caution.

Thank you for your understanding.

Sincerely,

_____/s/_____

Paul B. Hartwig
Associate Regional Director
Cultural Resource Stewardship and Partnership

cc: Laurel Wyekoff, Louisiana State Historic Preservation Officer; Judith Jones Moran, Housing Authority of New Orleans; Milan Ozdinec, HUD; Lee Keatinge, Advisory Council on Historic Preservation; Ray Nagin, Mayor of New Orleans; Elizabeth Merritt, National Trust for Historic Preservation; John Wettermark, Coliseum Square Association; Barry Schlaile, Historic Magazine Row; Rick C. Normand, Louisiana Landmarks Society, Inc.; William E. Borah, Smart Growth for Louisiana; Elhrei Thibodeaux, New Orleans Historic District Landmark Commission; Cammille Jones Strahan

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 16 2002

H32(2255)

Mr. David Blick
Historic Preservation Specialist
U.S. Department of Housing and Urban Development
Office of Community Planning and Development
451 Seventh Street, SW, Room 7244
Washington, DC 20410

Dear Mr. Blick:

This letter responds to your recent inquiry to the Director of the National Park Service (NPS) concerning the two letters from our Southeast Regional Office on the Department of Housing and Urban Development (HUD)-funded St. Thomas HOPE VI Redevelopment Project in New Orleans.

We have reviewed the two letters in question: Mr. Cecil McKithan's of September 10, 2002 (Mr. McKithan has since retired from federal employment), and Mr. Paul Hartwig's of November 18, 2002. Prior to issuing his letter, Mr. McKithan visited the site and reviewed certain documents from the project sponsor. Mr. McKithan said in his letter that the redevelopment would not have an adverse effect on any of the four National Historic Landmarks within the project's Area of Potential Effect. We are not aware of any dispute over Mr. McKithan's letter insofar as it pertains to new construc-

tion. Following Mr. McKithan's retirement, one for the parties to the Section 106 consultation process asked Mr. Hartwig to clarify whether NPS had taken into account such issues as the impact of increased traffic on the Garden District (NHL).

Mr. Hartwig reviewed the materials noted above and asked that conclusion of the 106 process be delayed to allow his office additional time to assess the project's impacts. However, given that HUD, in accordance with 36 CFR 800.10(c), appropriately sought NPS' comments and relied on those comments in good faith, we now withdraw our request that the 106 process be delayed to allow for further review by NPS.

Sincerely,

/S/

A. Durand Jones
Deputy Director

cc: Don Klima, Advisory Council on Historic Preservation

EXCERPT FROM AMENDED MEMORANDUM OF UNDERSTANDING, EXECUTED FEBRUARY 1, 2003, PAGE 2

WHEREAS, the proposed undertaking is described as follows:

- On-Site Redevelopment:
    - Demolition of 116 public housing buildings
    - Mothball of five public housing buildings and future rehabilitation for office/retail use
    - Installation of infrastructure for residential areas
    - New construction of approximately 369 housing units in 185 buildings including one-, two-, and three-bedroom rental units in double and four-plex configurations and single family attached and detached homes
    - New construction of 200 rental units (two 4- and 5-story buildings covering two city blocks) of one-, two-, and three-bedroom rental units with structured parking and ground floor retail
    - New construction of Riverview Continuing Care Retirement Center, consisting of approximately 312 units in one 13-story structure covering one city block with structured parking
    - New construction of residential condominiums that consist of one 14-story structure of approximately 100 units with structured parking
    - Disposition of approximately 6 acres from HANO to HRI for Riverview Retail Development.
    - New construction of Riverview Retail Development of approximately 199,000 square feet, with surface parking for 825 automobiles

- The Riverview Retail Development, to be occupied by a Super Wal-Mart, is bounded by Tchoupitoulas, Josephine, Rousseau, Religious, and St. Mary Streets. The retail development includes demolition of two properties that are contributing resources to the Lower Garden District: the Pelican Cotton Press at 425-41 St. Andrew Street and a water tower at 442 St. Andrew Street.

  - New Construction of approximately 67 elderly housing units in one 3-story building.

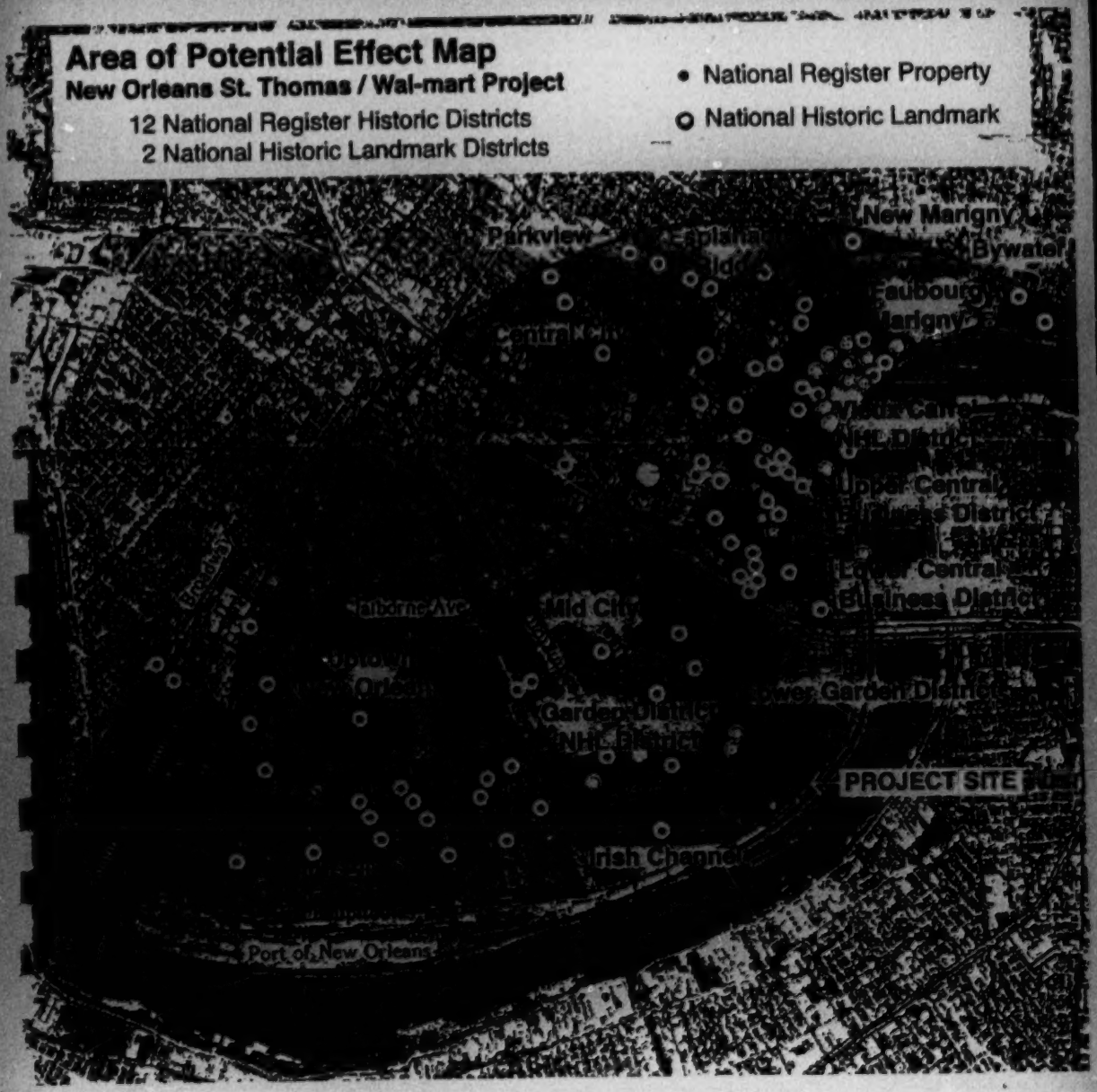
- Odd-Site Residential Program
  - Future demolition, new construction, and/or rehabilitation of 100 subsidized three- and four-bedroom units on scattered sites throughout the City of New Orleans.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLANTS' RECORD EXCERPTS

A map of the Project site in relation to numerous other National Register and National Historic Landmark districts and individual properties is attached hereto as Appendix H.



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No. 06-1248

Supreme Court, U.S.
FILED
JUL 27 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, *et al.*,

Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT HOUSING AUTHORITY OF NEW ORLEANS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Fifth Circuit's decision, upholding the Department of Housing and Urban Development's finding of no significant environmental impact in connection with extending a grant to help finance a public housing and community revitalization project in New Orleans, is a proper application of the arbitrary and capricious standard of review and in accordance with relevant precedent, the National Environmental Policy Act, and regulations promulgated thereunder.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Coliseum Square Association, Inc.; Smart Growth for Louisiana; Louisiana Landmarks Society, Inc.; Historic Magazine Row Association; and The Urban Conservancy, Inc. Respondents are Alphonso Jackson, Secretary of Housing and Urban Development; and the Housing Authority of New Orleans.

Respondent Housing Authority of New Orleans is not a nongovernmental corporation.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATUTES AND REGULATORY PROVISIONS 1

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 4

I. PETITIONERS MISCHARACTERIZE THE STANDARD OF REVIEW APPLIED BY THE FIFTH CIRCUIT, WHICH IN FACT FULLY COMPORTS WITH APPLICABLE LAW AND IS NOT PART OF ANY CONFLICT AMONG THE CIRCUITS 6

A. This Court Has Articulated That The Appropriate Standard For Reviewing An Agency Finding Of No Significant Impact Is Whether The Agency Has Considered The Relevant Factors And Whether The Agency Has Made A Clear Error Of Judgment 6

B. The Applicable Regulations Require That An Action Will Not Have A Significant Impact On The Quality Of The Human Environment To Support A FONSI And A Decision Not To Prepare An EIS 7

C. Petitioners Rely Upon Selective Language From The Fifth Circuit's Decision That Does Not Reflect The Standard Of Review That The Court Actually Applied 9

TABLE OF CONTENTS – Continued

Page

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT OVER THE PROPRIETY OF THE "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW AND IMPLEMENT THAT STANDARD BY ASKING WHETHER THE AGENCY ANALYZED THE RELEVANT FACTORS AND COMMITTED A CLEAR ERROR OF JUDGMENT 12

A. The Third, Fifth, And Tenth Circuits Are Applying The Standard Of Review Prescribed By This Court 12

B. The Result Below Would Not Be Any Different In The First, Second, Ninth, Eleventh, Or District Of Columbia Circuits 18

III. THE THREE FACTUAL EXAMPLES PETITIONERS OFFER OF THE FIFTH CIRCUIT'S ALLEGED ERROR DO NOT DEMONSTRATE THAT PETITIONERS WOULD BE SUCCESSFUL EVEN UNDER THE STANDARD OF REVIEW AS THEY CHARACTERIZE IT ... 21

IV. THIS CASE TURNS ON ITS SPECIFIC FACTS, WILL NOT REDRESS ANY INJURY ALLEGED BY PETITIONERS, AND WILL RESOLVE NO QUESTION OF EXCEPTIONAL IMPORTANCE 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Akiak Native Cmty. v. United States Postal Serv., 213 F.3d 1140 (9th Cir. 2000) 18, 19

Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531 (1987) 27

Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982) 17

C.A.R.E. Now, Inc. v. Fed. Aviation Admin., 844 F.2d 1569 (11th Cir. 1988) 17

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 5, 7

City of Waltham v. United States Postal Serv., 11 F.3d 235 (1st Cir. 1993) 13, 22, 25

Coal. on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987) 12

Conservation Law Found. v. Fed. Highway Admin., 24 F.3d 1465 (1st Cir. 1994) 19

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002) 17

Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004) ..... *passim*

Envtl. Prot. Info. Ctr. v. United States Forest Serv., 451 F.3d 1005 (9th Cir. 2006) 16

Gee v. Boyd, 471 U.S. 1058 (1985) 6

Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257 (10th Cir. 2004) 15, 16, 18

Harris County, Texas v. CarMax Auto Superstores, Inc., 177 F.3d 306 (5th Cir. 1999) 27

TABLE OF AUTHORITIES – Continued

Page

Hill v. Boy, 144 F.3d 1446 (11th Cir. 1998).....12, 14, 20, 21

Idaho Sporting Cong. v. Thomas, 137 F.3d 1146 (9th Cir. 1998).....12, 19

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 6, 15

Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989).....*passim*

Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997).....13, 16, 18, 20

Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001)..... 17

Ocean Advocates v. United States Army Corps of Eng'rs, 402 F.3d 846 (9th Cir. 2004) 12

Quinonez-Lopez v. Coco Lagoon Dev. Corp., 733 F.2d 1 (1st Cir. 1984) 13

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)..... 26

Sabine River Auth. v. Dep't of Interior, 951 F.2d 669 (5th Cir. 1992) 13, 14, 24

Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985)..... 22

Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).....19, 20

Sierra Club v. United States Forest Serv., 843 F.2d 1190 (9th Cir. 1988)..... 12

Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168 (3d Cir. 2000) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Town of Cave Creek, Arizona v. Fed. Aviation Admin., 325 F.3d 320 (D.C. Cir. 2003) 21

United States v. United Foods, Inc., 533 U.S. 405 (2001) 23

STATUTES

5 U.S.C. § 706 ..... 4, 6

42 U.S.C. § 4332 8

FEDERAL REGULATIONS

24 C.F.R. § 58.37 ..... 8, 14

40 C.F.R. § 1500.1 28

40 C.F.R. § 1500.1-1508.28 7

40 C.F.R. § 1501.4 8

40 C.F.R. § 1501.6 25

40 C.F.R. § 1508.9 8

40 C.F.R. § 1508.13 8

40 C.F.R. § 1508.27 9

STATUTES AND REGULATORY PROVISIONS

In addition to the statutory provisions and regulations set forth in the Appendix to the Petition, relevant regulatory provisions are included in the Appendix to Respondent Housing Authority of New Orleans' Brief in Opposition at 1a-6a.

COUNTERSTATEMENT OF THE CASE

The Fifth Circuit's opinion below provides a fair and accurate discussion of the facts pertinent to this case. (*See* Pet. App. 6a). Respondent Housing Authority of New Orleans (HANO) offers this Counterstatement of the Case to highlight for the Court certain significant facts that were omitted from or misstated in the Petition.

Petitioners are correct in characterizing the St. Thomas Redevelopment Project (the Project) as a "necessary urban public renewal plan." (Pet. 3). Indeed, the Project avoided significant damage from Hurricane Katrina and already is far along in providing a critical service to present-day New Orleans by replacing an aging, dilapidated, crime-ridden public housing project exhibiting vacancy rates exceeding 50%. The Project will eliminate these problems by providing a mixed use development encompassing low-income and market rate housing, a senior care facility, and a retail component. (*See* Pet. App. 6a-7a). The Project's revitalized mixed use community brings with it upgraded infrastructure and is much more compatible with the surrounding community than was the project it is replacing.

Part of the funding approved for this $320 million Project was a $25 million grant from the HOPE VI program administered by the United States Department of Housing and Urban Development (HUD) to foster innovative and comprehensive approaches to challenges presented by severely distressed public housing. (*See* Pet. App. 7a; Response Brief Filed for Defendant-Appellee The Housing Authority of New Orleans (HANO's Appellate Brief) at 13-14). The HOPE VI grant was but one component among many public and private sources in the financing package supporting this Project. Indeed, this is not a "hijacked" project serving the interests of a developer and big box retailer, as Petitioners suggest. (*See* Pet. 3). Instead, the participation of Wal-Mart and other private interests was and is integral to the financial success of the Project in revitalizing this neighborhood and providing essential housing upgrades in the New Orleans community ravaged elsewhere by recent physical disasters.

Petitioners attempt to highlight the contrast between the Wal-Mart portion of the Project and the residential and light commercial features located along Magazine Street in New Orleans' Lower Garden District as a problematic environmental impact. (*See* Pet. 4-5). However, Petitioners ignore the fact that the Wal-Mart is located in a section of the Lower Garden District wholly separate from the Magazine Street and Coliseum Square areas. Rather than being placed among quaint coffeehouses and bookstores, the Wal-Mart (as well as other parts of the Project Petitioners find objectionable) is physically separate and located along Tchoupitoulas Street, a roadway flanked by warehouses and a retaining wall running alongside the Mississippi River. (*See, e.g.*, Pet. App. 21a,

97a (and accompanying map highlighting the "Project Site")).

It is in this actual physical context that HUD evaluated the Project's impact on an extended area of potential effect, as described by Petitioners. (*See* Pet. 8; *see also* Pet. App. 8a). Specifically, HUD based its Finding of No Significant Impact (FONSI) and its determination not to proceed with an environmental impact statement (EIS) on the itemized evaluation set forth in its environmental assessment (EA). (*See* Pet. App. 9a).

In their continued efforts to revisit HUD's substantive determination, Petitioners introduce in their Petition information of wholly unknown validity which is not part of the administrative record under review in this case. (*See* Pet. 3). They also raise a complaint about HUD's failure to evaluate the impact from an influx of chain stores, a claim that Petitioners have waived because they did not assert it in the district court. Nowhere, however, do Petitioners provide information on any significant impacts that have arisen from the Wal-Mart, which began operating in 2004, or from the significant portions of the Project which have been completed and occupied. (*See* Pet. App. 9a). This is because no impacts contradicting HUD's challenged findings have occurred.

Virtually all of the HOPE VI grant, which constituted the HUD action being challenged by Petitioners in this case, has been disbursed. *See* Federal Defendant-Appellee's Supplemental Letter Brief of Feb. 23, 2006, at 5. In the proceedings below, Petitioners attempted to expand the controversy beyond the federal agency action by seeking an injunction not only compelling HUD to withhold HOPE VI funds until HUD prepared an EIS, but

also to enjoin any construction on the Project regardless of the source of funding. (*See* Pet. 5; Pet. App. 10a, 54a).

ARGUMENT

The decision below upholding HUD's actions under the National Environmental Policy Act (NEPA) was correct. Nevertheless, Petitioners now contend that the Fifth Circuit imposed an improperly deferential standard of review that conflicts with several other courts of appeals by asking whether a significant adverse effect was certain, rather than was likely, to occur. Contrary to Petitioners' contentions, the Fifth Circuit did not evaluate HUD's FONSI on the basis of whether a significant adverse impact was certain to occur. Furthermore, there is not a clear conflict between the courts of appeals in how they review these agency decisions under NEPA. The decision below was correctly grounded in a detailed review of the specific facts of this case, and as such does not present any issues of significance which merit the attention of this Court.

As this Court has settled in a recent unanimous opinion, an agency's decision to issue a FONSI and not to prepare an EIS may be set aside "only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004) (quoting the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). The "arbitrary and capricious" standard of review requires the reviewing court to ask whether a challenger has demonstrated that the agency failed to consider "the relevant factors" and whether the agency committed "a clear error

of judgment." *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). There is no dispute over the propriety of the "arbitrary and capricious" standard.

Petitioners craft their argument by seizing upon distinctions in language from various court opinions in an effort to create the appearance of a conflict where one does not exist. These distinctions do not represent a material difference in how the courts of appeals apply the "arbitrary and capricious" standard of review. First, Petitioners provide a general characterization of the Fifth Circuit's ruling below by focusing selectively on particular snippets of language from that opinion while ignoring other parts of the decision in which the language used is wholly inconsistent with Petitioners' generalizations. Furthermore, the cases Petitioners offer from other courts of appeals as indicative of an incorrect, conflicting standard of review do not ask whether a significant adverse impact certainly will occur before rejecting a FONSI. Instead, these courts and the Fifth Circuit have implemented the "arbitrary and capricious" standard in accordance with the dictates of *Marsh*.

Regardless of whether the Court believes that a significant split exists among the courts of appeals, and that Petitioners' characterization of the appropriate standard of review is the correct standard, application of that standard would not change the result in this instance. Petitioners simply proffered no convincing evidence to show that a significant impact was likely, or that HUD's FONSI, supported by information readily identifiable in the administrative record, was arbitrary, capricious, or not in accord with applicable law and regulations. Instead,

Petitioners rested largely upon their own conclusory assertions. HUD's disbursement of the HOPE VI grant is now nearly complete, the Project itself is well on its way to completion, and the Wal-Mart has been operating for some time. At no point did Petitioners offer evidence sufficient to warrant an injunction preventing these activities from continuing. Preparation of an EIS at this stage would serve no useful purpose under NEPA nor provide any meaningful relief to any injury allegedly sustained due to the challenged HOPE VI funding.

I. PETITIONERS MISCHARACTERIZE THE STANDARD OF REVIEW APPLIED BY THE FIFTH CIRCUIT, WHICH IN FACT FULLY COMPORTS WITH APPLICABLE LAW AND IS NOT PART OF ANY CONFLICT AMONG THE CIRCUITS

A. This Court Has Articulated That The Appropriate Standard For Reviewing An Agency Finding Of No Significant Impact Is Whether The Agency Has Considered The Relevant Factors And Whether The Agency Has Made A Clear Error Of Judgment

There is no dispute that an agency's decision to issue a FONSI and not to prepare an EIS may be set aside "only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Public Citizen*, 541 U.S. at 763 (citing 5 U.S.C. § 706(2)(A); *Marsh*, 490 U.S. at 375-76; *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).[1] As this Court described in *Marsh*, under

[1] Petitioners cite Justice White's dissent from the Court's denial of a petition for writ of certiorari in *Gee v. Boyd*, 471 U.S. 1058, 1059

(Continued on following page)

the "arbitrary and capricious" standard, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" 490 U.S. at 378 (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 416). That is, evaluating whether an agency action is "arbitrary and capricious" requires a reviewing court to ask (1) whether the agency considered the relevant *potential* impacts of the proposed action, and (2) whether the agency made a clear error of judgment regarding the effects of the proposed action on the quality of the human environment. "This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Id.* It is this standard of review that the courts of appeals, including the Fifth Circuit, have faithfully implemented.

B. The Applicable Regulations Require That An Action Will Not Have A Significant Impact On The Quality Of The Human Environment To Support A FONSI And A Decision Not To Prepare An EIS

Pursuant to NEPA, the Council on Environmental Quality (CEQ) has promulgated regulations that govern a federal agency's compliance with the statute. *See* 40 C.F.R. §§ 1500.1-1508.28. Those regulations present an absolute burden that an agency must meet in supporting a FONSI

(1985) as indicative of long-standing chaos in the courts of appeals regarding the appropriate standard of review. (Pet. 10). Petitioners contend this confusion has continued even after this Court's unanimous decision on that issue in *Marsh*. However, in 2004, this Court affirmed that the "arbitrary and capricious" standard of *Marsh* applies to review of a FONSI, and all of the cases upon which Petitioners rely, apart from the decision below, preceded *Public Citizen*.

and a decision not to prepare an EIS; that is, the agency must determine based upon a less intensive EA that its action "*will not* have a significant effect on the human environment." 40 C.F.R. § 1508.13 (emphasis added).

An EIS is required when there is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If the agency's proposed action is neither categorically excluded from the obligation to produce an EIS nor would clearly require the production of an EIS, the agency may initially prepare an EA. *See* 40 C.F.R. §§ 1501.4(a)-(b); *Public Citizen*, 541 U.S. at 757. An EA is "a concise public document" by which a federal agency "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. § 1508.9(a). If an agency determines that a proposed action will not have a significant impact, it prepares a FONSI, which "briefly present[s] the reasons why an action" will not significantly affect the quality of the human environment and for which an EIS is therefore unnecessary. 40 C.F.R. § 1508.13. *See also* 40 C.F.R. § 1501.4(e). HUD has promulgated additional regulations under NEPA which make clear that an EIS is required "when the project is determined to have a *potentially* significant impact on the human environment." 24 C.F.R. § 58.37 (emphasis added). Accordingly, to issue a FONSI, HUD must conclude with reasonable confidence that there will not be a significant impact, and its decision may be overturned if it committed a "clear error of judgment."

C. Petitioners Rely Upon Selective Language From The Fifth Circuit's Decision That Does Not Reflect The Standard Of Review That The Court Actually Applied

The Fifth Circuit did not employ the standard of review Petitioners affix to it. That is, the court did not ask whether Petitioners had demonstrated that there would certainly be a significant impact from HUD's HOPE VI grant to HANO. Petitioners' argument is simply an attempt to re-litigate parts of the case where they were unsuccessful in demonstrating that HUD either had ignored relevant potential impacts or that HUD had committed a clear error of judgment regarding those impacts.

Petitioners rely selectively upon language from the decision below to generate their characterization of the standard of review the Fifth Circuit applied, but ignore other more revealing language. For example, Petitioners do not discuss the court's analysis of their argument that HUD had not considered adequately the impacts of traffic created by the Project. The court explained that the Petitioners argued "that the impacts of traffic were *sufficiently controversial and uncertain* that HUD was required to prepare an EIS." (Pet. App. 34a) (emphasis added). But the court rightly rejected this argument because Petitioners offered nothing to show that these impacts were "highly controversial" or "highly uncertain" other than their own opposition to the Project. (*See id.*; 40 C.F.R. § 1508.27(b)(4)-(5)). This analytical approach indicates that the court was prepared to rule in Petitioners' favor had they demonstrated that the impacts of increased traffic were sufficiently "uncertain" such that it would be a "clear error of judgment" to have concluded that these

impacts were not significant. Petitioners simply did not provide evidence to their point. (*See* Pet. App. 27a-28a).

Similarly, "[Petitioners] offer[ed] nothing concrete to suggest that [an influx of additional national retailers] *will likely occur or [is] planned for* in this particular project area. . . . " (Pet. App. 29a) (emphasis added). Thus, Petitioners had not demonstrated that a potential impact was anything other than speculative, or that even if it came to pass, it might significantly affect the quality of the human environment. Further, the court noted that HUD adequately addressed the Project's "*potential* adverse effects on historic properties" and appropriately determined that those effects would not be significant when Petitioners offered no evidence to suggest otherwise. (*See* Pet. App. 34a, 38a-40a) (emphasis added).

When Petitioners contend that the Fifth Circuit considered the legal question to be "whether 'HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project *would* significantly affect the quality of the human environment,'" (Pet. 6-7), they ignore the beginning of the sentence from the opinion below, which is necessary to understand the court's approach. In fact, the court stated the following: "*The theme of [Petitioners'] remaining NEPA arguments is* that HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment." (Pet. App. 17a) (emphasis added). Petitioners are not citing the Fifth Circuit's characterization of the legal question, but rather attempt to pass off their own view as one held by the court

of appeals. It is not surprising that the Fifth Circuit characterized Petitioners' challenge in the manner it did, as Petitioners sought an injunction requiring HUD to prepare an EIS by arguing that there would *in fact* be a significant impact from the Project. *See, e.g.*, Appellants' Original Brief Filed on Behalf of Coliseum Square Association, Inc., Smart Growth for Louisiana, Louisiana Landmarks Society, Inc., Historic Magazine Row Association, and The Urban Conservancy (Appellants' Original Brief) at 1 ("HUD knew from the beginning that an EIS was required for the St. Thomas Redevelopment Project."); Appellants' Original Brief at 8 ("HUD's Administrative Record shows that there *will be* significant impact to the human environment." (emphasis added)); Appellants' Original Brief at 20 ("HUD's Administrative Record clearly shows that the Project *will have* a significant impact on the human environment, and *therefore* an [EIS] is required under NEPA." (emphasis added)); Appellants' Original Brief at 26 ("Local zoning changes significantly impact the human environment.").

The Fifth Circuit did not require Petitioners to demonstrate that a significant impact was certain to occur. Rather, it appropriately asked whether HUD had in fact analyzed the relevant potential impacts and had conducted its analysis in a reasoned way that supports its FONSI. In so doing, its approach was consistent with the standard set out by this Court in *Marsh* and affirmed in *Public Citizen* and, as shown below, with the practice of other courts of appeals.

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT OVER THE PROPRIETY OF THE "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW AND IMPLEMENT THAT STANDARD BY ASKING WHETHER THE AGENCY ANALYZED THE RELEVANT FACTORS AND COMMITTED A CLEAR ERROR OF JUDGMENT

A. The Third, Fifth, And Tenth Circuits Are Applying The Standard Of Review Prescribed By This Court

Contrary to Petitioners' contention, the Third, Fifth, and Tenth Circuits employ the "arbitrary and capricious" standard that this Court in *Marsh* and *Public Citizen* made clear is appropriate. These courts of appeals ask, consistent with this Court's direction, whether the agency considered the possible impacts from the proposed action and whether it made a clear error of judgment regarding those effects. Petitioners have selectively chosen cases from which they embellish distinctions in language to suggest that a wide gulf exists in how the courts of appeals have implemented the "arbitrary and capricious" standard of review. The distinctions that they raise do not expose any major differences.

Critically, some of the distinctions in language arise from relics of the pre-*Marsh* period when some courts employed a "reasonableness" standard of review while others used an "arbitrary and capricious" standard. *See, e.g., Hill v. Boy*, 144 F.3d 1446, 1450-51 (11th Cir. 1998) (citing *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66-67 (D.C. Cir. 1987)); *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2004) (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998), which cited *Sierra Club v. United*

States Forest Serv., 843 F.2d 1190, 1193 (9th Cir. 1988) which applied a "reasonableness" standard of review to a decision not to prepare an EIS); *City of Waltham v. United States Postal Serv.*, 11 F.3d 235, 239 (1st Cir. 1993) (citing *Quinonez-Lopez v. Coco Lagoon Dev. Corp.*, 733 F.2d 1, 2 (1st Cir. 1984), which noted that courts used different degrees of scrutiny pre-*Marsh*). This Court flatly rejected the "reasonableness" standard in *Marsh*, which Petitioners cited as a less deferential standard of review. (*See* Pet. 19). Nevertheless, the Court emphasized in *Marsh* that its decision "will not require a substantial reworking of long-established NEPA law" because the difference between "reasonableness" and "arbitrary and capricious" standards of review "is not of great pragmatic consequence." *Marsh*, 490 U.S. at 377 n.23. The differences that were "not of great pragmatic consequence" at the time of *Marsh* have shrunken in the intervening years, and there are no relevant and important distinctions today.

The analysis consistently used by the Fifth Circuit comports with the "arbitrary and capricious" standard, which it adopted shortly after *Marsh* in *Sabine River Authority v. Department of Interior*, 951 F.2d 669 (5th Cir. 1992). *See id.* at 677-78 (stating that *Marsh* had "undercut our precedent applying the reasonableness standard with respect to an agency's decision to forego the *original* EIS") (emphasis in original). The Fifth Circuit considers whether the agency has considered the relevant "potential" impacts. *See id.* at 678; *accord Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 16-17 (2d Cir. 1997) (rejecting a FONSI because the Forest Service failed to consider both the likely effects from unauthorized ATV use resulting from expansion of a road in a national forest to accommodate logging, and the adequacy of a proposed mitigation

measure to reduce unauthorized ATV use). It asks whether the agency's decision that those impacts are not significant represented a "clear error." *See Sabine River*, 951 F.2d at 679. For example, the agency's evaluation may not depend entirely upon a clearly wrong fact. *See, e.g., Hill v. Boy*, 144 F.3d at 1450-51 (holding that the record did not support an assumption that an underground petroleum pipeline would be relocated and thus would not be implicated in the NEPA analysis). As in *Sabine River*, the court below conducted "a painstaking review of the agency record" to ensure the proper impacts were analyzed and there "was no clear error in [the agency's] decision." 951 F.2d at 679.

Petitioners' claim that the Third Circuit applies a different standard from what this Court has directed also falls short. In *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000), upon which Petitioners rely, the court recognized that "HUD requires preparation of an EIS when a project is determined to have a *potentially* significant impact on the human environment." *Id.* at 173-74 (citing 24 C.F.R. § 58.37(a)) (emphasis added). That is, *Society Hill* did not require the challenger to show that an environmental impact from the project was in fact certain and significant. Rather, the court rejected the challenge because the plaintiffs in that case "[had] not raised a *substantial dispute* regarding the environmental effects identified . . . in [the] EA. . . . " *Id.* at 184 (emphasis added). Specifically, *Society Hill* involved a challenge to HUD's decision to allocate a grant to partially fund construction of a hotel and parking garage, on the basis that HUD had not appropriately considered cumulative impacts from other possible future development in the vicinity of the project. Relying upon this Court's decision

in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the court held that future hypothetical projects which could have possible environmental impacts were not sufficiently likely to warrant consideration in HUD's cumulative impacts analysis under NEPA. *Society Hill*, 210 F.3d at 180-82.[2] That is, NEPA "does not require an agency to consider possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *Id.* at 180 (quoting *Kleppe*, 427 U.S. at 410 n.20). Petitioners do not contest this Court's holding in *Kleppe*, and thus their discussion of *Society Hill* is largely inapposite.

Finally, Petitioners offer the Tenth Circuit case of *Greater Yellowstone Coalition v. Flowers,* 359 F.3d 1257 (10th Cir. 2004) to support their contention that some courts of appeals defer to an agency's FONSI unless a challenger shows that there will certainly be a significant impact. Their reliance upon *Greater Yellowstone Coalition* is misplaced. In that case, in looking at whether the Army Corps of Engineers had appropriately supported its FONSI, the Tenth Circuit analyzed whether the appellants had demonstrated "that the Corps [had] made a clear error in judgment or did not consider the factors relevant to [the proposed golf course's] impacts on bald eagles." *Id.* at 1277. These are precisely the questions that this Court described

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[2] The Third Circuit in *Society Hill* independently held that even if the future proposals to develop an entertainment complex in proximity to the hotel and parking garage were "sufficiently certain" to be constructed, the complex had no logical connection to the hotel and parking garage. 210 F.3d at 181-82. The question of whether future but uncertain projects must share some connection to the proposed action to be included in the cumulative impacts analysis was not raised in the proceedings below and is not posed by the Petition.

in *Marsh*. In answering those questions, the Tenth Circuit rejected the argument that the Fish and Wildlife Service's decision not to designate as "critical habitat" the area of a proposed golf course which served as nesting habitat for a pair of bald eagles necessarily implied that "its *potential* destruction should not be considered 'significant' for purposes of NEPA." *Id.* at 1275 (emphasis added). Similarly, the court "[did not] consider determinative [Fish and Wildlife Service's] conclusion that the [golf course project] was *not 'likely to jeopardize* the continued existence of the bald eagle' as a species." *Id.* at 1275-76 (emphasis added). Had the court employed the standard of review Petitioners ascribe to it, the Fish and Wildlife Service's conclusions would have made it impossible for the challengers to show that a significant impact to the species was certain, and the court would not have inquired further.[3]

Instead, the Tenth Circuit analyzed mitigation measures designed to reduce the project's "potential impact" on bald eagles to a level of insignificance, an approach endorsed in the courts of appeals which Petitioners contend apply the appropriate standard of review and to which Petitioners do not raise an objection in their Petition. *See, e.g., Nat'l Audubon Soc'y*, 132 F.3d at 17 ("When the adequacy of proposed mitigation measures is supported by substantial evidence, the agency may use those measures

[3] The *Greater Yellowstone Coalition* decision is comparable to the Ninth Circuit's approach in *Environmental Protection Information Center v. United States Forest Service*, 451 F.3d 1005, 1010-11 (9th Cir. 2006), where the court held that it was not arbitrary or capricious for the Forest Service to conclude that there would not be a significant adverse effect upon the northern spotted owl species even though a proposed timber logging program was projected to have an impact upon the nesting habitat of three pairs of owls.

as a mechanism to reduce environmental impacts below the level of significance that would require an EIS."); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733-34 (9th Cir. 2001) ("An agency's decision to forego issuing an EIS may be justified in some circumstances by the adoption of [mitigation] measures."); *C.A.R.E. Now, Inc. v. Fed. Aviation Admin.*, 844 F.2d 1569, 1575 (11th Cir. 1988) ("When mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of 'significant impacts' is not reached so no EIS is required.") (citing *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982)). Thus, in reviewing an agency's FONSI, the Tenth Circuit does not ask whether the challenger has shown that there will *certainly* be a significant impact.[4]

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[4] *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) is also instructive. In *Davis*, the court held that an EA did not consider adequately the potentially significant impacts associated with a two-phase highway project where a new interchange linking an interstate to a two-lane state highway would be constructed first, and then the existing state highway would be widened and extended later. Specifically, the Department of Transportation had not considered that the persons living along the state highway after the interchange was completed and before the highway was expanded "*may* suffer from pollution, noise and safety impacts." *Id.* at 1124 (emphasis added). Noting that the plaintiffs had demonstrated that the timetable for completing the second phase was unclear and likely to be substantially delayed, the court determined that "[t]he *potentially* significant impacts from phasing have not been adequately studied in the EA." *Id.* at 1124, 1124 n.13 (emphasis added). Further, noting that the EA did not offer a sufficient discussion of cumulative impacts, the court maintained that, based upon the record, those cumulative impacts "*may* be significant" and that there had been a "clear error of judgment." *Id.* at 1125 (emphasis added). Accordingly, the Tenth Circuit does not employ the standard articulated by Petitioners, and does not deviate significantly from the approach in other courts of appeals.

The Third, Fifth, and Tenth Circuits do not employ the standard of review Petitioners ascribe to them. Instead, they implement the "arbitrary and capricious" standard in accordance with this Court's directive in *Marsh* and *Public Citizen*, and do so in a way that is not materially different from the other courts of appeals.

B. The Result Below Would Not Be Any Different In The First, Second, Ninth, Eleventh, Or District Of Columbia Circuits

The result below would not be any different in the First, Second, Ninth, Eleventh, and District of Columbia Circuits, as Petitioners contend. Whether there is in fact a significant impact is a substantive determination for the agency. *See Akiak Native Cmty. v. United States Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000); *Nat'l Audubon Soc'y*, 132 F.3d at 18; *Greater Yellowstone Coal.*, 359 F.3d at 1274; *see also Marsh*, 490 U.S. at 376 ("The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise."). Therefore, as the Ninth Circuit recognizes, a reviewing court's duty is to "consider only whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Akiak*, 213 F.3d at 1146. In this fashion, the court reviews whether the agency's decision is arbitrary, capricious, or an abuse of its discretion, just as directed in *Marsh* and as the Fifth Circuit did in this case.

An agency may validly decide that an EIS is not necessary when an adverse impact is likely, or even certain, so long as the effect will not significantly affect the quality of the human environment. There has to be

more than a mere chance that an adverse impact will occur and be significant. For example, in *Akiak*, the Ninth Circuit reviewed a determination by the Postal Service that an experimental program to deliver mail by surface hovercraft rather than by aircraft to remote Alaska Native villages would not have a significant impact on the environment. While the court noted that the EA discussed particular impacts that "could" or "may" result, plaintiffs' objection to the EA could not be sustained because the EA "does not conclude that there were *substantial questions* whether those impacts would occur and be significant" and plaintiffs had not offered any evidence to suggest that those conclusions were wrong. *Id.* (emphasis added) (citing *Idaho Sporting Cong.*, 137 F.3d at 1149). The First Circuit also makes clear that a challenger must demonstrate that an impact is more than merely possible. *See Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1475 (1st Cir. 1994) (holding that although the record contained evidence that a highway construction project would have a detrimental impact upon some wetlands, the evidence did not sufficiently contradict a conclusion that the project would not significantly affect the environment). The Fifth Circuit requires nothing different.

HUD's NEPA analysis in the present matter stands in contrast to the clear errors of judgment at issue in the cases Petitioners cite. For example, Petitioners discuss *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), but that case was decided well before both *Marsh* and *Public Citizen* and is distinguishable on its facts. *Peterson* rejected a Forest Service FONSI for an oil and gas leasing program for exploration on federal land. The Forest Service reached its finding of no significant impact based upon a determination that "if unacceptable environmental

impacts cannot be corrected, activities [on the lessee's use of the land] will not be permitted." 717 F.2d at 1413. However, the court noted that once the Forest Service's leasing program was approved, the government was barred subsequently from precluding any activities which the lessee proposed. Thus, the agency's reasoning represented a clear error of judgment and the agency had not adequately considered possible impacts. The Forest Service's logical fallacy in *Peterson* is far from the itemized consideration HUD gave to the possible impacts from the Project in its EA.

National Audubon Society and *Hill v. Boy* are also distinguishable on their facts, and do not reflect a true split among the courts of appeals. In *National Audubon Society*, the Forest Service's own expert concluded that an adverse impact to black bears was likely if improvements to a road necessary to support logging in a national forest increased public access. 132 F.3d at 16-17. Avoiding increased public access depended upon closing off the logging road to all-terrain vehicles, but the Service had not offered any evidence to suggest that its proposed mitigation measures would in fact prevent ATV use that would otherwise occur. Accordingly, the Forest Service did not "adequately consider all relevant environmental factors" prior to issuing its FONSI. *Id.* at 17.[5] *Hill v. Boy* stands for

[5] Nonetheless, the Second Circuit in *National Audubon Society* rejected the portion of the district court's decision that mandated preparation of an EIS to address the "potentially significant" impact to black bears from the logging road extension. Instead, the Second Circuit ruled that the "question is substantive, and consequently not one within the purview of the district court." 132 F.3d at 18. That is, the relief Petitioners seek here – a finding that an EIS is required – was not available and appropriate even when the agency had failed to consider adequately a possible, relevant impact.

the proposition that an agency's analysis must be coherent; it cannot be based solely upon facts that are clearly wrong. In *Hill*, the Eleventh Circuit held that a finding of no significant impact from proposed construction of a dam and reservoir was inadequate when the Army Corps of Engineers ignored possible impacts associated with an underground petroleum pipeline by assuming explicitly that the pipeline would be relocated, in the absence of any evidence to support that assumption and in the face of substantial contradictory evidence showing that the pipeline was to remain. 144 F.3d at 1450-51.

The Fifth Circuit's interpretation of the *Marsh* and *Public Citizen* standard of review is not in conflict with these cases. Petitioners simply could not show that HUD had ignored relevant impacts, based its analysis entirely upon a fact that was clearly wrong, or otherwise committed a clear error of judgment. Petitioners "pointed to nothing casting serious doubt" on HUD's methods of analysis and its conclusion that there was not substantial uncertainty regarding the effect of the action, nor have they "made a serious argument that [the Project] will have a 'significant adverse' impact." *See Town of Cave Creek, Arizona v. Fed. Aviation Admin.*, 325 F.3d 320, 332-33 (D.C. Cir. 2003).

III. THE THREE FACTUAL EXAMPLES PETITIONERS OFFER OF THE FIFTH CIRCUIT'S ALLEGED ERROR DO NOT DEMONSTRATE THAT PETITIONERS WOULD BE SUCCESSFUL EVEN UNDER THE STANDARD OF REVIEW AS THEY CHARACTERIZE IT

Petitioners did not even satisfy the standard of review they offered as appropriate in their Petition. The three

specific complaints Petitioners raise before the Court require a fact-intensive analysis typical under NEPA. First, Petitioners complain that a zoning change to accommodate aspects of the Project implied that it is impossible for HUD to decide that Wal-Mart is compatible with "a Nineteenth Century mixed-use neighborhood." (Pet. 21). But Petitioners provided no evidence below to demonstrate that a zoning change would significantly impact the environment. Merely asserting so is not sufficient. *See City of Waltham*, 11 F.3d at 241-42 (rejecting a complaint that construction of a proposed mail distribution facility would increase road traffic in a local town because the town offered "no factual data" to support that possibility, and finding that the town had not shown "any substantial likelihood that an environmentally significant lessening of stormwater runoff will occur" even though its expert had predicted that construction would cause a 25% to 30% reduction in runoff onto wetlands). Petitioners raise *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) to support their position, but the court below rightfully determined that Petitioners had not, and could not, analogize properly to that case, which involved a drastic change in land use. (*See* Pet. App. 20a-21a).

The record below included substantial evidence to support HUD's judgment. The Wal-Mart is within a corridor of industrial warehouses and a primary center for heavy trucking and freight operations, while the residential portion of the Project borders residential area. (*See id.*). The Project will return the former St. Thomas area to the population density and building style of the rest of the Lower Garden District, and construction is subject to design review to ensure compatibility with surrounding area. *See* Brief for the Federal Defendant-Appellee at 26

(citing AR1366-67, 2648). Petitioners countered this evidence with only a document of questions and comments that petitioner Coliseum Square Association, Inc. authored that singled out the Wal-Mart. *See* Appellants' Original Brief at 27 (citing AR2966). Petitioners contend now that the Fifth Circuit applied an inappropriate standard when it held that Petitioners "had not established that the consequences of the Wal-Mart Supercenter would *necessarily* have a significant effect on the quality of the neighborhood. . . . " (Pet. 8 (emphasis in original)). That contention overlooks Petitioners' argument below. Because Petitioners offered no evidence of possible substantial impacts from the zoning change, they effectively asked the court to endorse a blanket rule that a zoning change by itself implied a significant adverse impact. *See* Appellants' Original Brief 26 ("Local zoning changes significantly impact the human environment."). The Fifth Circuit was not required to make such a holding in the face of HUD's reasoned conclusion. Petitioners offered no real evidence to show why HUD erred and why a significant impact is even substantially likely, let alone certain.

Second, Petitioners argue that HUD and the Fifth Circuit ignore the possibility that Wal-Mart will attract other national chain stores. Petitioners waived this argument because they did not raise it at the district court level, and it was inappropriately considered by the Fifth Circuit. *See* HANO's Appellate Brief at 50-51. Thus, this particular objection would not properly be before this Court. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Cf. Public Citizen*, 541 U.S. at 764-65 (holding that a party had forfeited particular objections to an EA when it failed to raise those objections to the agency which prepared the EA).

Nevertheless, the Fifth Circuit did in effect what Petitioners assert it should have done. It concluded that Petitioners had not demonstrated that national chain stores would likely follow Wal-Mart into the Project area and significantly affect the quality of the human environment. (*See* Pet. App. 22a-23a, 29a).[6] "HUD in fact considered information from a wide range of sources" to support its conclusion, and Petitioners "simply misstate the record when they assert that HUD entirely ignored" an economic study Petitioners emphasize. (Pet. App. 23a). Specifically, HUD used materials such as the findings of an inventory of local businesses, a national economic study, and an environmental justice study to help substantiate its finding that Wal-Mart's presence would not significantly impact the quality of historic properties neighboring the project. In the case of conflicting evidence before the agency, the agency has discretion to accept or reject from the different sources, even where it is relying upon its own experts. *See Marsh*, 490 U.S. at 378; *Sabine River*, 951 F.2d at 678. A reviewing court is not to revisit that

[6] Again, Petitioners criticize the decision below for applying an inappropriately deferential standard of review, but then ignore important aspects of the court's opinion. Petitioners assert that the court rejected their arguments regarding the impact from other national chain stores they say will follow Wal-Mart because "there was 'nothing concrete' to show that an influx of national chain retailers *will* occur." (Pet. 8 (emphasis in original)). But this characterization leaves out the critical word upon which Petitioners have based their argument about a split in the courts of appeals – "likely." In rejecting Petitioners' complaint about cumulative impacts, the court emphasized that "[Petitioners] offer nothing concrete *to suggest* that such changes *will likely occur or are planned for* in this particular project area, but rely on broad statistical data discussing general national trends." (Pet. App. 29a (emphasis added)). The court's language reflects an approach consistent with what Petitioners advocate is appropriate. Petitioners simply disagree with the court's conclusion.

substantive evaluation outside of the *Marsh* standard of review. *See Marsh*, 490 U.S. at 378. Petitioners had to produce "factual data that suggests [the] possibility is other than speculative." *City of Waltham*, 11 F.3d at 241. Petitioners did not, and thus they failed to show that any such impact was substantially likely to occur and to significantly affect the quality of the human environment. (*See* Pet. App. 29a).

Finally, Petitioners argue it was inappropriate for HUD to rely upon the National Park Service's finding that the Project would not significantly impact National Historic Landmarks, contending that the Park Service "disavowed any identifiable basis" for its no-impact finding. (Pet. 23). Petitioners overstate what the Park Service did. The Park Service issued a no-impact letter, the letter's author thereafter left the Service, and the Service subsequently asked for more time to look again at its conclusion. After re-examining its materials, the Park Service decided not to reject its original conclusion. (*See* Pet. App. 39a-40a). NEPA regulations explicitly contemplate that agencies will consult with each other when their jurisdictions overlap in analyzing project impacts. *See* 40 C.F.R. § 1501.6.[7] Thus, when conducting a NEPA analysis, an agency may appropriately give significant weight to the opinion of another agency with expertise on an environmental impact issue. Again, Petitioners offered nothing

[7] "Cooperating agencies" are responsible for "developing information and preparing environmental analyses" in their areas of expertise to assist the lead agency. 40 C.F.R. § 1501.6(b)(3). "Cooperating agencies" include "any other Federal agency which has jurisdiction by law," and an agency "which has special expertise with respect to any environmental issue" and whose assistance is requested by a "lead agency." *Id.* at § 1501.6.

other than speculative, conclusory statements to undercut the Park Service's opinion. Accordingly, Petitioners fell short even under the standard of review of their own devise.

IV. THIS CASE TURNS ON ITS SPECIFIC FACTS, WILL NOT REDRESS ANY INJURY ALLEGED BY PETITIONERS, AND WILL RESOLVE NO QUESTION OF EXCEPTIONAL IMPORTANCE

It is well settled that NEPA is a statute that establishes procedural requirements but leaves a federal agency such as HUD with ultimate discretion to reach substantive conclusions on the significance of environmental impacts. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Petitioners will not be able to overturn HUD's substantive conclusions through this litigation. Even if the Court finds that there is a meaningful difference in the standards of review applied by the courts of appeals, and the Court determines that the standard Petitioners advocate is correct, Petitioners will not prevail on their claims. As discussed in the preceding section, the record is replete with support for HUD's substantive conclusions about the level of impacts from the Project. Petitioners continue to assert that HUD and the lower courts got it wrong because they simply object to Wal-Mart's presence.

Moreover, even if the Court rules in favor of Petitioners' proposed standard of review, and in subsequent proceedings HUD's FONSI is determined to be "arbitrary, capricious, or an abuse of discretion," Petitioners have not demonstrated any relief that would be appropriate. HUD has nearly completely disbursed the challenged HOPE VI partial funding for the Project, and the Project is substantially occupied and well on its way to completion. The

remainder of the Project is not significantly dependent upon the availability of further HUD funding; thus, the relief that Petitioners might seek is not related to their underlying claim regarding the federal agency action at issue.

Preparing an EIS for the Project would not prevent construction of the Wal-Mart. Petitioners sought unsuccessfully an injunction halting all construction, and the Wal-Mart opened for business beginning in 2004 and continues to operate. (Pet. App. 9a, 54a-55a). Petitioners still seek to enjoin further work on the Project until HUD has prepared an EIS, which requires them to establish four factors: (1) actual success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the threatened injury to the defendant; and (4) that granting injunctive relief does not harm the public interest. *See Harris County, Texas v. CarMax Auto Superstores, Inc.*, 177 F.3d 306, 312 (5th Cir. 1999); *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) (noting that the standard for a permanent injunction is essentially the same as for a preliminary injunction, except that the plaintiff must show actual success on the merits rather than a substantial likelihood). Petitioners did not offer evidence of this nature in the proceedings below to support entry of an injunction.

An EIS would not serve to elucidate any additional useful information regarding the impacts that already have been thoroughly considered by HUD. The present conditions do not reveal cause for concern about any significant impacts that HUD did not evaluate properly in

its EA.[8] Perhaps most notably, an EIS would not help assure delivery of a badly-needed range of new residential units for a region suffering from severely diminished housing capacity due to the catastrophic effects of Hurricane Katrina. Instead, an EIS would result simply in more paperwork and would prevent the necessary and productive redevelopment of the St. Thomas area from continuing. NEPA was not designed to result simply in more, better paperwork. *See* 40 C.F.R. § 1500.1(c).

Finally, any ruling by this Court can be expected largely to reaffirm the standard of review for agency compliance with NEPA already set forth in *Marsh* and continued in *Public Citizen*. The outcomes of future challenges to federal agency implementation and FONSI determinations will still depend heavily upon the facts applicable in a given case.

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[8] HUD issued its final EA after providing a full opportunity for public comment following numerous general meetings on the Project open to the public. (*See* Pet. App. 8a-9a; *see also* HANO's Appellate Brief at 24-26).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

REGULATORY PROVISIONS

Pertinent provisions of the federal regulations governing all federal agencies are printed at 40 C.F.R. §§ 1500.1 – 1508.28. In addition to those regulations included in the Appendix to the Petition, relevant provisions include:

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to

generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1508.9 Environmental assessment.

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Supreme Court, U.S.
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No. 06-1248

In the Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Housing and Urban Development's decision to fund a revitalization project after preparing an environmental assessment and issuing a finding of no significant impact was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 6
Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 14
Greater Yellowstone Coal. v. *Flowers*, 359 F.3d 1257 (10th Cir. 2004) 10, 12, 13
Hill v. *Boy*, 144 F.3d 1446 (11th Cir. 1998) 10
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 11, 12
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 6
National Audubon Soc'y v. *Hoffman*, 132 F.3d 7 (2d Cir. 1997) 10
Ocean Advocates v. *United States Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005) 10
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 2, 14
Sierra Club v. *Marsh*, 769 F.2d 868 (1st Cir. 1985) 8, 9, 10
Sierra Club v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) 10

Cases—Continued: Page

Society Hill Towers Owners' Ass'n v. *Rendell*, 210 F.3d 168 (3d Cir. 2000) 10, 11, 12
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 2
Wetlands Action Network v. *United States Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001) 13

Statutes and regulations:

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
42 U.S.C. 4332(2)(C)(i) 2
National Historic Preservation Act, 16 U.S.C. 470 *et seq.* 4
5 U.S.C. 706(2)(A) 7
42 U.S.C. 1437*l* (1994) 3
40 C.F.R.:
Pt. 1501:
Section 1501.3 2
Section 1501.4(e) 2
Pt. 1502 2
Pt. 1508:
Section 1508.9 2
Section 1508.13 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 465 F.3d 215. The orders of the district court (Pet. App. 52a-67a, 68a-78a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2006. A petition for rehearing was denied on December 13, 2007 (Pet. App. 79a). The petition for a writ of certiorari was filed on March 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C)(i). NEPA is a procedural statute that does not mandate substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It is designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

Implementing regulations issued by the Council on Environmental Quality (CEQ) provide that an agency may prepare an environmental assessment (EA), which is a "concise public document" that briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. 40 C.F.R. 1501.3, 1508.9. If the agency determines, based on the EA, that the proposed federal action will not significantly affect the environment, it can discharge its NEPA duties by making a finding of no significant impact. 40 C.F.R. 1501.4(e), 1508.13. If, however, the agency determines that the proposed action will significantly affect the environment, it must prepare a more thorough environmental impact statement (EIS) concerning the project. See 40 C.F.R. Pt. 1502.

2. The St. Thomas Housing Development (St. Thomas) was a 1510-unit public housing project located in the Lower Garden District of New Orleans. Pet. App. 6a-7a. In the early 1990s, St. Thomas was excessively run-

down and crime-ridden. The Housing Authority of New Orleans (HANO) applied for a Homeownership and Opportunity for People Everywhere (HOPE VI) grant from the United States Department of Housing and Urban Development (HUD) to revitalize St. Thomas. In 1996, HUD awarded HANO $25 million of HOPE VI funds for the St. Thomas project. *Ibid.*[1]

As with other HOPE VI projects, the goals of the St. Thomas revitalization included decreasing the concentration of poverty, ending the social and economic isolation of residents, leveraging non-federal resources to enable the housing authority to house more people, and making community social service training programs more available to residents. A.R. 2617. To further those goals, HANO's application for federal funds proposed creating a mixed-income community by renovating some of St. Thomas's existing units and constructing new rental and home-ownership units. Pet. App. 7a.

In 1998, HANO enlisted the help of a private developer, Historic Restorations, Inc., to assist in improving the plan. Pet. App. 7a. In 2000, HANO submitted an amended revitalization plan to HUD for approval. *Ibid.* The amended plan focused on new construction so the site could be reconfigured to match the lower population density design of the surrounding Lower Garden District. HANO reasoned that the new plan would be both more efficient to implement and safer for residents upon completion. A.R. 1366. HANO also proposed including a 275,000 square-foot retail center on nearby abandoned industrial land; the retail component was added to sup-

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[1] HOPE VI is a federal public housing funding program that gives grants to local housing authorities to revitalize distressed public housing. See A.R. 2617; 42 U.S.C. 1437*l* (1994). The court of appeals' opinion transposes the letters in the Roman numeral.

ply residents with jobs, goods, and services and to buffer the residential units from the Tchoupitoulas Street industrial corridor. Pet. App. 7a; A.R. 1366.

Several years of internal and public review of the environmental and historic property impacts of the St. Thomas revitalization project preceded the decision to go forward with the project, including review under NEPA and the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.* Pet. App. 7a-9a. Numerous public meetings were held to address issues connected to the St. Thomas revitalization project. The retail development was scaled down from the initial proposal of 275,000 square feet to 199,000 square feet and Wal-Mart was selected as the retailer. *Id.* at 8a.

After its initial NEPA review of the project, HUD reopened its NEPA process to further study the project. Pet. App. 9a. HUD considered and analyzed public comments and project alternatives. On February 20, 2003, HUD completed an EA, determined that it was not necessary to prepare an EIS, and issued a finding of no significant impact. A.R. 1-12. The EA evaluated many categories of potential impacts from the project, including noise, environmental justice, zoning, economic effects on nearby businesses, historic preservation, toxic and hazardous waste, lead contamination, traffic, and cumulative impacts from other nearby projects. Pet. App. 23a-24a, 28a-29a, 75a.

3. Petitioners filed this lawsuit, alleging violations of NEPA and NHPA. The district court granted in part HUD's motion for summary judgment. Pet. App. 68a-78a. With respect to petitioners' NEPA claims, the court held that, "[h]aving reviewed the administrative record," HUD's EA and finding of no significant impact were not "arbitrary and/or capricious in any respect."

Id. at 75a. The district court observed that the administrative record reveals that HUD evaluated all of the issues raised by petitioners, and "[a]lthough HUD relied on experts with whom [petitioners] disagree, and reached conclusions that conflict with [petitioners'] opinions," those were "not valid grounds for vacating HUD's decision." *Id.* at 75a-76a. The district court subsequently dismissed as moot petitioners' remaining claims. *Id.* at 52a-67a.

4. A unanimous panel of the court of appeals affirmed. Pet. App. 1a-51a. As an initial matter, the court concluded—based on supplemental briefs it requested at oral argument—that the case was not moot. *Id.* at 9a-11a. The court observed that "many significant parts of the project have been completed," including the Wal-Mart shopping center, which has been open for business since late 2004, and many of the housing units. *Id.* at 9a. The court nevertheless concluded that petitioners' claims were not moot because "significant projected construction and renovation remain unfinished." *Id.* at 10a.

The court of appeals then conducted an extensive review of the record and explained in detail its conclusion that HUD had not acted arbitrarily or capriciously with respect to each of petitioners' asserted deficiencies in HUD's NEPA review. Pet. App. 17a-35a. The court of appeals discussed, *inter alia*, petitioners' concerns with respect to noise, environmental justice, zoning changes, businesses occupying historic properties, toxic and hazardous waste, lead contamination, traffic, cumulative impacts, mitigation and context, and intensity. *Ibid.* The court concluded that petitioners "failed to demonstrate in any instance that HUD acted arbitrarily, capriciously, or contrary to the law in deciding that the

project did not cause significant effects to human environment." *Id.* at 35a.[2]

ARGUMENT

The court of appeals' decision is based on a factbound application of the standard of review under the Administrative Procedure Act (APA): that the agency's decision not to prepare an EIS should be set aside only if arbitrary, capricious, an abuse of discretion, or contrary to law. That standard is applied by every circuit to consider the issue since this Court's decision in *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989). Applying that standard, the court of appeals correctly concluded that HUD did not act arbitrarily or capriciously when it decided not to prepare an EIS for its funding of the St. Thomas project. Further review is not warranted.

1. In *Marsh*, this Court held that the APA's arbitrary-or-capricious standard of review applies to an agency's decision not to prepare a supplemental EIS, which this Court likened to the decision whether to prepare an EIS in the first instance. 490 U.S. at 374-376. This Court also has emphasized that the reviewing court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," a standard of review that is ultimately "a narrow one." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)

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[2] The court of appeals also rejected petitioners' claims that federal regulations required the preparation of an EIS under the circumstances here (Pet. App. 12a-17a), that HUD arbitrarily and capriciously concluded that the project would result in no adverse effects to historic properties under the NHPA (*id.* at 35a-40a), and that the district court incorrectly resolved various motions (*id.* at 40a-51a).

(*Overton Park*). Thus, a reviewing court "is not empowered to substitute its judgment for that of the agency." *Ibid.*

Here, the court of appeals correctly stated the appropriate standard of review, and it properly applied that standard to the facts of this case. As the court recognized, "[a]n agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pet. App. 11a (quoting 5 U.S.C. 706(2)(A)). And, in a straightforward application of *Marsh* and *Overton Park*, the court analyzed whether "HUD acted reasonably and in accordance with law in deciding, based on its EA and [finding of no significant impact], that its action had no direct or indirect effects that significantly affected the quality of the human environment." *Id.* at 12a.

Petitioners' claim that the court applied an inappropriate standard of review is unfounded. Petitioners contend that the court applied a standard that requires a plaintiff challenging an agency's decision not to prepare an EIS to "show that the project will, in fact, cause significant effects on the human environment." Pet. 16. In support of that contention, petitioners state that the court "posed the legal question as whether 'HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project *would* significantly affect the quality of the human environment.'" Pet. 6-7 (emphasis added by petitioners) (quoting Pet. App. 17a). But that statement by the court of appeals was merely its re-statement of petitioners' argument; it was not the court's formulation of the applicable standard of review. See Pet. App. 17a

("*The theme of plaintiffs' remaining NEPA arguments is that* HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment.") (emphasis added).

Moreover, the court's careful analysis of specific aspects of the project belies petitioners' suggestion (Pet. 16, 20-24) that the court of appeals required them to demonstrate that the project would "in fact" have significant environmental effects. With respect to the local zoning changes (Pet. 20-22), the court rejected petitioners' argument that such changes constitute a significant environmental impact that automatically requires preparation of an EIS. Pet. App. 20a-21a. Based on the facts of this case, the court correctly concluded that petitioners had not demonstrated that HUD acted arbitrarily or capriciously in determining that the zoning changes did not cause such an impact. *Ibid.* The court observed that the Wal-Mart and the high-rise structures are located in an industrial corridor and that the remaining residential units bordered the nearby residential areas. *Id.* at 21a. In so holding, the court expressly distinguished the facts here from those in one of the cases on which petitioners rely, *Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). See Pet. App. 20a-21a. There, the First Circuit addressed a "radical[]" change of "replacing an undeveloped wooded island with a marine terminal and industrial complex," which the court determined necessitated an EIS. *Marsh*, 769 F.2d at 872.

With respect to the effects Wal-Mart might have on other retailers (Pet. 22-23), the Fifth Circuit did not require, as petitioners contend (see Pet. 16), a showing that a significant environmental impact was a certainty.

Rather, the court rejected petitioners' argument that HUD had to study cumulative impacts from other national retailers following Wal-Mart to the area, reasoning that such a consequence was not "reasonably foreseeable." Pet. App. 29a. The court examined the evidence offered by petitioners and concluded that their argument was supported only by "broad statistical data discussing general national trends" and that they had offered "nothing concrete to suggest that such changes will likely occur" in the area. *Ibid.* Thus, the court concluded that any harm to the environment based on that evidence was "highly speculative" and thus not reasonably foreseeable. Contrary to petitioners' suggestion (Pet. 22-23), rejecting petitioners' evidence as highly speculative is not the same as requiring petitioners to demonstrate that significant environmental impacts will certainly occur. See *Marsh*, 769 F.2d at 878 ("Of course, agencies need not consider highly speculative or indefinite impacts.").

Petitioners also point to the court of appeals' reasoning with respect to their NHPA claim to support their claim of a circuit conflict on the appropriate standard of review for NEPA claims. Pet. 23-24 (citing Pet. App. 40a). In rejecting petitioners' NHPA claim, the court of appeals concluded (Pet. App. 40a) that HUD had reasonably relied on the National Park Service's opinion that the project would have no (let alone significant) adverse impact on National Historic Landmarks. Even assuming that that conclusion related to the standard of review the court of appeals applied to petitioners' NEPA claims (see *id.* at 34a), that conclusion was fully supported by the record.

2. Contrary to petitioners' assertion (Pet. 10), there is no "longstanding and pervasive circuit disagreement"

on the standard of review applicable to an agency's decision not to prepare an EIS. As *Marsh* instructed, all of the circuits to consider the issue, including the seven circuits cited by petitioners (Pet. 10 nn.7-8), apply the APA's arbitrary-or-capricious standard of review. See *Marsh*, 769 F.2d at 870-871; *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *Society Hill Towers Owners' Ass'n* v. *Rendell*, 210 F.3d 168, 178-179 (3d Cir. 2000); *Ocean Advocates* v. *United States Army Corps of Eng'rs*, 402 F.3d 846, 858-859 (9th Cir. 2005); *Greater Yellowstone Coal.* v. *Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (*Greater Yellowstone*); *Hill* v. *Boy*, 144 F.3d 1446, 1450 (11th Cir. 1998); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983). Indeed, it is telling that no circuit actually recognizes the "long-standing and pervasive circuit disagreement" (Pet. 10) petitioners posit, and that petitioners did not raise the issue on petition for rehearing and did not seek review from the en banc court.

As petitioners note (Pet. 13-16), several circuits have inquired, when considering whether an agency acted arbitrarily or capriciously in deciding not to prepare an EIS, whether there is a "substantial possibility" of significant environmental effects. Whatever the merit in that inquiry as part of a court's application of the arbitrary-or-capricious standard, this Court's review is not warranted because, as explained above, the court here did not review HUD's decision in a manner that is in conflict with that formulation. Nor, as explained below, do the decisions of the Third and Tenth Circuits relied on by petitioners create the conflict petitioners suggest. Pet. 16-18 (citing *Society Hills Towers Owners' Ass'n*, *supra*, and *Greater Yellowstone*, *supra*).

The plaintiffs in *Society Hill* challenged HUD's approval of a grant to the City of Philadelphia for a downtown hotel and parking garage after preparing an EA and determining that the project did not require an EIS. 210 F.3d at 172-173. The Third Circuit considered in some detail the appropriate standard of review, and determined that this Court's decision in *Marsh* required it to apply the APA standard. *Id.* at 178-179. Applying that standard, the court rejected the plaintiffs' argument that the EA had failed to consider the cumulative impacts caused by the project combined with a possible future entertainment complex the city had proposed. *Id.* at 180-182.

The Third Circuit concluded that the entertainment complex was not a sufficiently concrete proposal to require an analysis of its possible cumulative impacts with the proposed hotel and parking project. *Society Hill*, 210 F.3d at 180-182. In reaching that conclusion, the court relied on this Court's decision in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.20 (1976), and decisions from several other courts of appeals (including ones that petitioners posit are on the other side of the alleged conflict). Those decisions emphasized that "[NEPA] does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." See, *e.g.*, *ibid.* In the alternative, the Third Circuit concluded that, even if the entertainment complex were certain to be completed, the two projects were "not sufficiently interdependent" to require analysis of both when approving the hotel and parking project. *Society Hill*, 210 F.3d at 182.

Petitioners rely on the Third Circuit's statement that it was "not at all *certain* that the proposed 'mega' enter-

tainment complex or any of the projects included in the planning documents [would] ever be completed," Pet. 17 (emphasis and alteration added by petitioners) (quoting *Society Hill*, 210 F.3d at 182), to suggest that the Third Circuit requires a plaintiff to show that the project "will, in fact, cause significant effects on the human environment" before an agency is required to prepare an EIS. Pet. 16-17. Read in context, however, it is clear that the Third Circuit did not *sub silentio* establish a new standard of review for decisions not to prepare an EIS. Instead, the court simply concluded that the entertainment complex was a "less imminent action[]" that need not be studied in conjunction with the proposed hotel and parking project, as contemplated by *Kleppe* (427 U.S. at 410 n.20) and numerous decisions from other courts of appeals. That conclusion is also tempered by the court's alternate holding that, even if the entertainment complex were certain to be built, NEPA still did not require HUD to examine its effects because the projects were not interdependent. See *Society Hill*, 210 F.3d at 182.

The Tenth Circuit's decision in *Greater Yellowstone* is a similarly straightforward application of the APA's arbitrary-or-capricious standard and likewise of no aid to petitioners. There, the court considered whether the Army Corps of Engineers was required to prepare an EIS before issuing a permit allowing a housing development and golf course. 359 F.3d at 1262. The Tenth Circuit—just like the Third Circuit in *Society Hill* and the Fifth Circuit here—determined that the appropriate standard of review is the APA's arbitrary-or-capricious standard. *Id.* at 1274.

The court then considered whether, among other things, alleged potential impacts to bald eagles required

the Corps to prepare an EIS. The court noted that although the impacts to bald eagles were uncertain, that uncertainty "stemmed not from a lack of thoroughness in investigating potential impacts" but from the difficulty in predicting individual eagle responses because "eagle behavior varies greatly among individuals and by circumstance." *Greater Yellowstone*, 359 F.3d at 1276 (internal quotation marks omitted). The court concluded, given that uncertainty, that the Corps' required mitigation measures "'constitute an adequate buffer' against adverse impacts to bald eagles so as to 'render such impacts so minor as to not warrant an EIS.'" *Ibid.* (quoting *Wetlands Action Network* v. *United States Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001). The Tenth Circuit thus concluded that the Corps did not act arbitrarily or capriciously in deciding not to prepare an EIS. *Id.* at 1277.

Petitioners contend that the Tenth Circuit held that an EIS is not required if the impacts are uncertain or if the plaintiffs have not shown that the action will "definitely significantly affect" the environment. Pet. 18. But the Tenth Circuit's decision in *Greater Yellowstone* expressly concluded that the mitigation rendered any impacts to bald eagles too minor to warrant an EIS. The "uncertainty" of impacts to individual eagles was therefore resolved by the mitigation, 359 F.3d at 1276-1277; contrary to petitioners' contention (Pet. 18), the court did not hold that the uncertainty was itself "sufficient to support the Corps' decision not to prepare an EIS."

3. In any event, this case would not present an appropriate vehicle for resolving the question presented. While this litigation has been pending, HANO has con-

tinued demolition and construction associated with the St. Thomas project. As the court of appeals recognized (Pet. App. 9a), HANO has completed substantial portions of the revitalization—including the Wal-Mart, which is operational, and many of the housing units, which are occupied. As of February 2006, most of the federal funding that triggered the requirement of environmental review had been disbursed. See Gov't C.A. Supp. Letter Br. 3-5 (noting that, as of that date, HUD had authorized the release to HANO of $22,352,516, or over 88%, of the challenged $25 million HOPE VI grant) (citing Riddel Decl. para. 4).

As noted above, NEPA is a procedural statute that does not mandate substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Thus, even if the Court were to grant review and conclude that HUD's NEPA analysis was inadequate, the proper course would be for the Court to remand the case to the agency to redetermine whether an EIS needs to be prepared. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (where a reviewing court concludes that an agency's analysis is defective, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). By that time, no meaningful relief would result from HUD doing further environmental review of any remaining expenditure of federal funds for this local project. For this reason also, this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007

(7)

No. 06-1248

IN THE

Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, ET AL.,
Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. THE CIRCUITS ARE DIVIDED OVER WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS 1

II. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT 5

CONCLUSION 9

APPENDIX 1ra

TABLE OF AUTHORITIES

Page(s)

CASES

Greater Yellowstone Coal. v. Flowers,
359 F.3d 1257 (10th Cir. 2004).....4

Kleppe v. Sierra Club,
427 U.S. 390 (1976).....3

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989).....1

Society Hill Towers Owners' Ass'n v. Rendell,
210 F.3d 168 (3d Cir. 2000).....3

U.S. ex rel. Caruso v. Zelinsky,
689 F.2d 435 (3d Cir. 1982).....3

OTHER AUTHORITIES

1 Michael Gerrard,
Environmental Law Practice Guide
(2006).....4

Br. of U.S. In Opp'n,
Cuellar v. United States, No. 06-1456
(August 3, 2007).....4

Korey A. Nelson, Comment,
Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See The Forest Because There Are Too Many Trees,
17 Tul. Envtl. L.J. 177 (2003).....5

REGULATIONS

36 C.F.R. § 800.6.....7

REPLY BRIEF FOR PETITIONERS

Our opening petition describes a long-standing circuit court conflict on the standard governing an agency determination whether or not to conduct an environmental impact statement ("EIS") as required by the National Environmental Policy Act ("NEPA"). In their respective briefs, federal and state respondents attempt to minimize the circuit court disagreement by changing the question presented, misreading the law of two circuits, and obscuring the reasoning of the court below. In the end though, respondents cannot hide the significant and well-known circuit court discord on the question, a question well-presented by this case.

Certiorari is warranted.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS

1. Our petition describes (at 13-18) the circuit court disagreement about whether or not an agency must consider potential impacts of a project when declining to conduct an EIS. The federal and state respondents attempt to distract attention from the circuit court disagreement by making an irrelevant observation, pointing out that the circuits all agree that "arbitrary and capricious" is the applicable standard. (HUD Br. at 10; HANO Br. at 6.) Of course, all the circuits formally apply the arbitrary and capricious standard because this Court mandated that standard in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The appellate courts uniform and mechanical recitation of the arbitrary and capricious standard of review is unexceptional. But the question presented by this petition asks the Court to resolve appellate discord that has developed after *Marsh* regarding the *meaning* of the arbitrary and capricious standard. Specifically, the Court is invited to resolve whether an agency

acts arbitrarily and capriciously when it makes a finding of no significant impact ("FONSI") – and thus avoids having to conduct an EIS – without considering potential impacts.[1] As to the circuit confusion on that question, the courts' uniform statements that arbitrary and capricious review is the relevant overarching standard is beside the point.

Indeed, parsing the careful language of expert Supreme Court pleadings, both the U.S. Solicitor General and private appellate counsel for HANO effectively concede circuit confusion on this issue. The Solicitor General nowhere includes his typical claim of "no conflict" in the courts of appeals, *c.f., e.g.*, Br. For United States In Opp'n, *Cuellar v. United States*, No. 06-1456 at 12-18 (August 3, 2007) ("there is no conflict in the courts of appeals on this issue"), instead arguing there is not "'pervasive'" disagreement. (HUD Br. at 9-10.) The Solicitor General also obliquely hints (at 10) at the circuit court disagreement by acknowledging that "several circuits" ask whether there is a "substantial possibility" of significant environmental effects. For its part, HANO hedges, asserting that there is no "significant split" (at 5), "not a clear conflict" (at 4), and no "true split" (at 20), but, like the federal government, never asserts no circuit court disagreement. Though the writing is careful, the message is clear: there is meaningful and undeniable disagreement among the circuits on the question presented.

2. After implicitly conceding the split, respondents attempt to harmonize the divergent case law. As explained in

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[1] Here, petitioners challenge HUD's conclusion that the St. Thomas Project will not significantly affect the human environment because that conclusion did not include a consideration of potential – as opposed to certain – impacts from the project. We have not argued that HUD is compelled to find that the project *will* significantly affect the human environment (and thus must issue an EIS) on the current record (*cf.* HUD Br. at 8-9; HANO Br. at 22-26); we are challenging the sufficiency of HUD's conclusion that the project will *not* have a significant effect.

the petition (at 13-16), the First, Second, Ninth, Eleventh, and D.C. Circuits do not permit federal agencies to ignore potential impacts when deciding whether to conduct an EIS. Respondents attempt to show that the Third and Tenth Circuits also so hold, but that is wrong. Moreover, as we discuss in Section II, the decision below likewise conflicts with decisions from the First, Second, Ninth, Eleventh, and D.C. Circuits.

The holding of *Society Hill Towers Owners' Association v. Rendell*, 210 F.3d 168 (3d Cir. 2000), is plain: the City was free to ignore potential impacts – such as a proposed "mega" entertainment complex – and therefore decline to prepare an EIS. In the respondents' view, *Society Hill Towers* turns on *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), a case holding that an agency need not consider "less imminent" projects under a "cumulative impacts" analysis. (*See* HUD Br. at 12 (citing *Kleppe*, 427 U.S. at 410 n.20); HANO Br. at 14-15.) But *Kleppe*'s statement that agencies need not consider the cumulative impacts of "less imminent actions" was directed at potential projects that are "less imminent" as compared to actions that "reach the stage of actual proposals." *Kleppe*, 427 U.S. at 410 n.20. *Society Hill Towers*, by contrast, involved a "*proposed* 'mega' entertainment complex," 210 F.3d at 182 (emphasis added), and thus the "less imminent" rationale of *Kleppe* was inapplicable.[2] Instead,

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[2] Contrary to assertions by HUD and HANO, the *Society Hill Towers* holding that the local agency need not consider potential impacts when declining to conduct an EIS is not at all "tempered" by that court's subsequent holding that the complex was not connected to the hotel and parking complex at issue. (*See* HUD Br. at 12; HANO Br. at 15 n.2.). Under Third Circuit law, "an alternate holding has the same force as a single holding; it is binding precedent." *U.S. ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982). *See also Society Hill Towers*, 210 F.3d at 182 ("Moreover, *even if the Residents could establish that these projects were going to be completed*, that finding would not undermine the City's FONSI because the district court [later] concluded that those pro-

the Third Circuit reasoned that the City could ignore the potential impacts of the entertainment complex because those impacts were not certain to occur.

Similarly, respondents misconstrue the Tenth Circuit's decision in *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004). Respondents contend that *Greater Yellowstone* turned on the adequacy of the mitigation measures, and not on the lack of certainty as to future effects of the plan. (*See* HUD Br. at 13; HANO Br. at 17.) Neither the Tenth Circuit nor the agency, however, ever considered whether the mitigation measures would independently reduce the potential impacts; it concluded only that they sufficed "[i]n light of the evident difficulty in predicting" future events. *See Greater Yellowstone*, 359 F.3d at 1276. Thus, the Tenth Circuit permitted the agency to ignore potential effects for purposes of deciding whether to conduct an EIS.

Moreover, as we discuss below, the decision of the court of appeals here aligns the Fifth Circuit with the position of the Third and Tenth Circuits.

3. *Amici* law professors confirm that the First, Second, Ninth, Eleventh, and D.C. Circuits are in conflict with the Third, Fifth, and Tenth Circuits. (Law Prof. Br. at 6-10.) As *amici* note, "the circuits have diverged in the application of [the arbitrary and capricious] standard." (*See id.* at 6 (citing 1 Michael Gerrard, *Environmental Law Practice Guide* § 1.11[5] (2006) ("The plaintiff's burden of proof in showing that an agency's action significantly affects the quality of the human environment differs among the various circuits."), and Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See The Forest Because There Are Too Many Trees*,

---

jects and the hotel/parking garage are not sufficiently interdependent." (emphasis added)).

17 Tul. Envtl. L.J. 177, 198 (2003) (recognizing disagreement among circuits regarding arbitrary and capricious review, that "raises the specter of becoming hopelessly mired in multiple meanings of a single term")).)

II. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

This case is an ideal vehicle to resolve whether an agency must consider potential impacts of a project when declining to conduct an EIS because that question is outcome determinative. Respondents suggest that the court below did not permit HUD to ignore potential effects, that insufficient funds remain to warrant review, and that the land use decision here is of no consequence. Each of these arguments is based on a misreading of the record.

1. The petition observes that the court posed the standard of judicial review as whether HUD considered effects that "would" occur and proceeded to apply that standard to ignore even likely effects caused by the project. (Pet. at 6-7.) Rather than defend this highly deferential standard, respondents attempt to show that the court applied a more rigorous standard. But the decision below – like the decisions from the Third and Tenth Circuits – permits a federal agency to decline to conduct an EIS after ignoring potential impacts. That holding is squarely inconsistent with those circuits that require agencies to consider potential impacts when deciding whether to conduct at EIS. (Pet. at 6, 9, 16.)[3]

The petition demonstrates that only under the highly deferential "would" standard could the court of appeals possibly affirm the decision below. For example, HUD asserted that

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[3] Moreover, the court of appeals expressly applies a "would" standard. (*See* Pet. App. at 17a.) Respondents suggest that the court is simply stating petitioners' argument, but the substance of the court's decision makes clear that the court is in fact applying a "would" standard.

the project complied with local zoning law without considering the potential impacts of the necessary zoning changes (or acknowledging that changes were required). (*See* Pet. App. at 20a-21a; Pet. at 7-8.) Similarly, HUD did not consider the potential impacts of the project on National Historic Landmarks. (*See* Pet. App. at 40a; Pet. at 23-24.) In the same vein, HUD did not consider the potential impacts of other national retailers following this Wal-Mart SuperCenter into the neighborhood. (*See* Pet. App. at 29a; Pet. at 7-9, 22-23.) The only standard of judicial review that could permit the court of appeals to uphold HUD's no-impact finding here is a highly deferential standard that permits HUD to ignore future effects unless the effects certainly "would" occur.[4]

2. Respondents assert that a ruling in petitioners' favor will have little practical effect because "most of the federal funding that triggered the requirement of environmental review ha[s] been disbursed," and thus petitioners can obtain "no meaningful relief." (HUD Br. at 14; *see also* HANO Br. at 3.) Notably, respondents do not (and cannot) say HUD's oversight of the St. Thomas Project will end when the $25 million grant is spent. In fact, as petitioners explained in the court below (*see* Appellants' C.A. Supp. Letter Br. at 3-5), HUD's oversight obligations will continue throughout the construction of the entire $320 million federal housing project. HUD is responsible for overseeing construction of the entire "housing facility," including its "non-public housing units." 24 C.F.R. § 964.604. Thus, as HUD itself advised HANO in 2000, even privately-funded portions of the St. Thomas development are subject to HUD oversight.

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[4] HANO – but not the federal government – asserts that the First, Second, Ninth, Eleventh, and D.C. Circuits would have affirmed HUD's refusal to conduct an EIS here. (*See* HANO Br. at 18-21.) But HANO cannot point to a single case where any of those Circuits has approved a FONSI issued by an agency that failed to consider so many likely (if not certain) impacts from the project.

Similarly, HUD is obliged to ensure that all parties comply with the Memorandum of Agreement ("MOA"), which HUD relied on when declining to conduct an EIS, even after the last HUD dollar is spent. *See* 36 C.F.R. § 800.6(c) ("The agency official *shall* ensure that the undertaking is *carried out* in accordance with the memorandum of agreement." (emphasis added)). The MOA requires continued monitoring of the entire St. Thomas Project site with respect to, *inter alia*, traffic, drainage, and historical impacts. HUD will thus be involved in reviewing the environmental impacts of the project throughout the construction, and will have input in specific planning proposals.

Moreover, large portions of proposed development at St. Thomas remain at the planning stage, and respondents tellingly fail to contend otherwise. For example, not all aspects of Phases I and II are completed, and workers have not yet broken ground on Phase III.

In view of HUD's ongoing monitoring responsibilities and the amount of building work that remains, the preparation of an EIS, even at this point, could significantly assist HUD in mitigating or eliminating the project's environmental impacts.

3. Finally, we must correct the misrepresentation of the St. Thomas Project that permeates HANO's brief. Contrary to HANO's suggestions (at 1-2), this is not a mixed use project with a small retail "component," but a massive retail project with ever-shrinking housing elements. Nor is the project "wholly separate" or "physically separate" from the Lower Garden District (at 1-2). It is right in the heart of the District, as the map (Pet. App. at 98a) plainly shows. Similarly, HANO's claim that the Wal-Mart and related buildings will "return" the St. Thomas area "to the population density and building style of the rest of the Lower Garden District" is ridiculous. Massive amounts of parking and high-rise

condominiums, for example, were not exactly common in the nineteenth century when the St. Thomas area was planned as a pedestrian-scale neighborhood.[5]

* * *

The standards governing an agency decision whether or not to conduct an EIS are of exceptional importance. As the *amici* law professors explain, the preparation of an EIS is necessary to ensure informed environmental decision-making. (*See* Law Prof. Br. at 10-20.) Moreover, as *amicus* National Trust for Historic Preservation observes, failure to conduct a necessary EIS damages the reasoned decision-making regarding historic preservation mandated by the National Historic Preservation Act. (*See* Nat'l Trust Br. at 9-19). The Solicitor General does not deny the importance of the question presented.[6] Because the circuits are divided on a question of exceptional importance that is well presented by this case, review is warranted.

---

[5] Despite HANO's asserted concern for low-income residents of New Orleans following Hurricane Katrina (*see* HANO Br. at 1, 28), U.S. District Judge Peter Beer recently reprimanded HANO for its "self-serving actions" in allocating housing units at the St. Thomas site that were designated for low-income occupants to HANO management – at rents designed for poor renters. (*See* Reply App. at 1ra-3ra.) Although merely approving a consent decree, Judge Beer, a former New Orleans City Councilman, felt compelled to assert that HANO took an "'us first' attitude," creating "an un-level playing field for former St. Thomas residents." (*Id.* at 2ra.)

[6] HANO implies (at 28) that the question presented is unimportant because "an EIS would result simply in more paperwork." NEPA's "paperwork," however, is its core mechanism for protecting the human environment through reasoned environmental decision-making. (*See* Law Prof. Br. at 5 (quoting President Nixon's statement regarding NEPA)).

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

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Attorneys for Petitioners

August 15, 2007

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DASHA CORNER AND GREATER NEW ORLEANS FAIR HOUSING ACTION

VERSUS

THE HOUSING AUTHORITY OF NEW ORLEANS AND LGD RENTAL 1, LLC, doing business as RIVER GARDEN APARTMENTS

FILED
U.S. District Court
Eastern District of LA
2007 JUL 5
Loretta G. Whyte,
Clerk

CIVIL ACTION NO. 06-10751

SECTION M

PER CURIAM:

The Court is indebted to Magistrate Judge Sally Shushan and the attorneys in this case for painstakingly fashioning an even-handed, impartial and essentially equitable arrangement as set forth in the attached Consent Decree approved and signed this date.

However, this Court feels compelled to make the following observations in connection therewith:

Following Hurricane Katrina, LGD Rental 1, LLC (HRI/River Garden) leased low income units reserved for former St. Thomas residents to management employees of the Housing Authority of New Orleans (HANO). These leases were renewed in March 2006, for an additional six months allowing HANO management employees to stay in these units until September 30, 2006 at a rate designed solely for low-income occupants.

This Court believes that the "us first" attitude at HANO and HRI/River Gardens, who spend excessive amounts of time and expense serving their own management, created an un-level playing field for former St. Thomas residents.

The central tragedy here is that their callous and indifferent "leadership" was not unlike that which stalked our city generally after Hurricane Katrina. That same, self-serving, uncaring, "pass the buck" bureaucratic swampland followed the examples set by the city, state and federal officials. It was carried out with the same indifference and lack of leadership so apparent over most of the scene of suffering following the storm.

A thread runs through the protestations of the defendants not unlike those of the Federal Emergency Management Agency (FEMA), City Hall, and a host of other agencies who performed poorly following Katrina. The scorn and incompetence visited upon those citizens in such perilous need set a new low for federally-supported agencies, whose very reason for existence was to provide decent low-income housing. HANO management itself occupied those premises which were available or were made available for more than a year following the storm, at a rental rate obviously set for low-income or no-income renters, all the while playing bureaucratic games with those whose lack of education or understanding left them essentially without an avenue of relief.

Here in this battered old city, we have seen unfaithfulness in public positions at every level – national, state, and local. Leadership at HANO and HRI/River Gardens was no exception. Except in very few isolated and ineffectual instances, no hands-on concern or self-sacrifice ever appeared on this nightmare scene. Expediency, self-serving actions, and a lack of meaningful assistance or

encouragement to those most in need was the order of the day.

New Orleans, Louisiana, this 5th day of July, 2007.

/s/ Peter Beer
Peter Beer
United States District Judge

2

(2)

SUPREME COURT
FILED
APR 13 2007
OFFICE OF THE CLERK

No. 06-1248

IN THE

Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, *et al.*,
Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL TRUST FOR HISTORIC PRESERVATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. FEDERAL AGENCIES TOO OFTEN VIOLATE NEPA 3

A. Federal Agencies Often Circumvent NEPA by Failing to Prepare Environment Impact Statements 3

B. HUD Routinely Approves Funding for Major Projects Without Preparing An EIS 6

1. HUD Has Uniformly Avoided Preparing EISs for HOPE VI Projects, Even Though the Program is Designed to "Significantly" Affect the Environment 6

2. In New Orleans Alone, HUD is Currently Proposing to Demolish Four Major Historic Public Housing Projects Similar to St. Thomas, Without Preparing an EIS 8

II. COMPLIANCE WITH NEPA IS CRUCIAL FOR HISTORIC PRESERVATION 9

TABLE OF CONTENTS – Continued

Page

A. Avoidance of NEPA's EIS Requirement Undermines the NHPA 10

1. Overuse of EAs Can Harm the Public's Ability to Participate in the Section 106 Review Process 11

2. Reliance on EA Documentation Can Skew Agency Determinations under Section 106 14

3. Failure to Prepare an EIS Reduces the Scope of Analysis for Impacts on Historic Resources 14

B. Avoidance of NEPA's EIS Requirement Often Leads to Inadequate Consideration of Specially Designated Historic Resources 16

1. Importance of the *National Register of Historic Places* 17

2. Importance of *National Historic Landmarks* 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Jackson, 2007 WL 458232 (E.D. La. Feb. 6, 2007) 9

Coalition Against a Raised Expressway (CARE) v. Dole, 17 Envtl. L. Rep. 20,466, 20,472 (S.D. Ala. Oct. 20, 1986), *aff'd*, 835 F.2d 803 (11th Cir. 1988)..... 19

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) 2

Moody Hill Farms Ltd. Partnership v. United States Dep't of the Interior, 205 F.3d 554 (2d Cir. 1999) 17

Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1981)..... 11

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 3,12

Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985)..... 5,13

Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976))..... 11

United States v. 162.20 Acres of Land, More or Less, Situated in Clay County, Miss., 639 F.2d 299 (5th Cir. 1981)..... 11

Vieux Carré Property Owners, Residents & Assoc's, Inc. v. Brown, 948 F.2d 1436 (5th Cir. 1991)..... 10

TABLE OF AUTHORITIES

Page

STATUTES

16 U.S.C. § 470a(a)(1)(A) 17
16 U.S.C. § 470a(a)(2) 17
16 U.S.C. § 470f 2,10,12,15
16 U.S.C. § 470(b)(3) 10
16 U.S.C. § 470(b)(4) 10
16 U.S.C. § 470h-2(f) 19
16 U.S.C. § 470h-2(i) 12
16 U.S.C. § 470h-2(*l*) 11
42 U.S.C. § 1437v 7
42 U.S.C. § 1437v(a)(1) 7
42 U.S.C. § 4331(b)(2) 9
42 U.S.C. § 4331(b)(4) 9,10
42 U.S.C. § 4332 7,11
42 U.S.C. § 4344 3

REGULATIONS

36 C.F.R. § 60.2(a) 18
36 C.F.R. § 60.3(f) 17
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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae National Trust for Historic Preservation (National Trust)[1] is a private nonprofit organization chartered by Congress in 1949 to "facilitate public participation" in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With the strong support of our more than 277,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The National Trust also has a role in overseeing the implementation of the National Historic Preservation Act (NHPA), since Congress designated the Chairman of the National Trust as a member of the Advisory Council on Historic Preservation, the independent federal agency responsible for implementing and enforcing the NHPA. *See id.* § 470i(a)(8).

The National Trust's expertise on historic preservation law is widely recognized. The Trust has participated as *amicus curiae* before this Court in a variety of cases involving historic preservation issues, ranging from constitutional cases to issues of statutory interpretation.[2] In

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[1] Pursuant to Rule 37(6), counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(2)(a), the National Trust has received written letters of consent to the submission of this brief from all parties, which have been filed with the Clerk of the Court.

[2] *E.g., Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002); *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *International College of Surgeons v. City of Chicago*, 522 U.S. 156 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989);

addition, the National Trust participated as *amicus curiae* in this case below, before the U.S. Court of Appeals for the Fifth Circuit.

SUMMARY OF THE ARGUMENT

The National Trust believes this Court's review is necessary to resolve confusion among the federal courts regarding the standard of judicial review when an agency decides not to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The Fifth Circuit's misinterpretation of *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989), will encourage federal agencies to avoid preparing EISs even when major federal projects may have significant impacts on protected resources. This approach has serious consequences for historic properties, and can frustrate the consultation and review process under Section 106 of the NHPA, 16 U.S.C. § 470f.

In this case, the U.S. Department of Housing and Urban Development (HUD) approved funding for a massive project involving the demolition of nearly an entire historic public housing complex in New Orleans (116 out of 121 historic buildings, with approximately 1,500 residential units), without the benefit of the in-depth analysis required by an EIS. This project is by its very nature designed to have a significant impact on the human environment, and that impact includes irreparable harm to nationally recognized historic resources. The Court should grant this petition in order to resolve the confusion and correct the Fifth Circuit's misinterpretation of the law.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

ARGUMENT

I. FEDERAL AGENCIES TOO OFTEN VIOLATE NEPA.

The National Trust is concerned that federal agencies appear to be increasingly departing from the letter and spirit of NEPA, especially by attempting to avoid the preparation of EISs. The fundamental purposes of NEPA are circumvented when federal agencies avoid the preparation of an EIS despite the potential for "significant" impacts. As this Court has stated "[s]imply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). When agencies improperly avoid the preparation of an EIS, the environmental values that NEPA is intended to protect, including historic resources, are jeopardized. The petition before this Court presents such an instance.

A. Federal Agencies Often Circumvent NEPA by Failing to Prepare Environmental Impact Statements.

The Council on Environmental Quality (CEQ), the agency established by Congress to issue regulations implementing NEPA and to ensure that federal agencies meet their NEPA obligations,[3] has raised questions about the potential overuse of Environmental Assessments (EAs):

> Since NEPA was passed, the role of the EA has evolved to the point where it is the predominant way

[3] 42 U.S.C. § 4344.

> agencies conduct NEPA analyses. . . . With the increased use of EAs . . . comes the danger that public involvement will be diminished and that individually minor actions will have major adverse cumulative effects. . . .[4]

The CEQ further noted that "[s]ome states, citizen groups, and businesses believe that certain EAs are prepared to avoid public involvement . . . . Avoiding an opportunity for public comment on draft EAs and FONSIs can create mistrust and add costs and time as projects are delayed by ensuing controversy and legal challenges." *CEQ Effectiveness Study*, *supra* note 4, at 19.

While data is available on the numbers of EISs prepared by federal agencies each year, "[u]nfortunately, accurate comparisons of the numbers of EISs and EAs prepared are not available." *Id.* Statistics on EAs are "maddeningly difficult to ferret out,"[5] because "EAs are often not reported at all." *Id.* Nonetheless, the CEQ has estimated that, "since the CEQ regulations were promulgated, all signs point to a significant increase in EAs and a decrease in EISs."[6]

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[4] Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years* 19-20 (Jan. 1997), *available at* http://www.nepa.gov/nepa/nepa25fn.pdf [hereinafter *CEQ Effectiveness Study*].

[5] Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 946 (May 2002) ("In most agencies, even the NEPA compliance officers at agency headquarters do not track or compile EAs and FONSIs, devolving such duties to regional or subregional offices where record keeping may be lax or inconsistent across regions. Thus, in many cases it is difficult, if not impossible, for interested persons even to learn that an EA has been produced, much less to gain access to its contents.")

[6] *CEQ Effectiveness Study*, *supra* note 4, at 19; COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1995), *available at* http://ceq.eh.doe.gov/-reports/1994-95/25th_ann.pdf [hereinafter CEQ REPORT].

For example, in 1973, when NEPA was relatively new, federal agencies filed a total of about 2,000 EISs.[7] Even though the size and activities of the federal government as a whole have increased since that time,[8] the number of EISs prepared has decreased by 75%. In 2006, only 542 EISs were filed by federal agencies.[9] In contrast, the number of EAs has increased substantially since NEPA was enacted. The CEQ estimated that in 1993 about 50,000 EAs were prepared annually.[10]

The dramatic reduction in the number and proportion of EISs prepared since NEPA was enacted represents a trend that raises serious concerns about whether NEPA is functioning as it was intended. "Despite NEPA's lofty goal of 'fully informed' agency decisionmaking, most of the government's NEPA machinery is now devoted not to producing [EISs], but to producing just enough information to justify the conclusion that the 'fully informed' EIS inquiry is unnecessary." Karkkainen, *supra* note 5, at 920-21 (footnote omitted). In order to avoid the perceived time and cost of a "litigation proof" EIS, "the agency's most important objective becomes to avoid the statutory EIS tripwire in the first place." *Id.* at 919. Such an approach seriously undermines the goals of NEPA.

As the First Circuit has recognized, "those outside the agency have less opportunity to comment on an EA than on an EIS," and "those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS." *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (Breyer, J.). According to the CEQ, "[t]he result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of

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[7] *See id.*; http://ceq.eh.doe.gov/nepa/EISs_by_Year_1970_2006.pdf.

[8] *See* Karkkainen, *supra* note 5, at 920.

[9] *See* http://ceq.eh.doe.gov/nepa/EISs_by_Year_1970_2006.pdf.

[10] CEQ REPORT, *supra* note 6, at 51; *CEQ Effectiveness Study*, *supra* note 4, at 19; Karkkainen, *supra* note 5, at 920 & nn.73-74.

fewer alternatives, all of which are at the very core of NEPA's strengths."[11]

B. HUD Routinely Approves Funding for Major Projects Without Preparing an EIS.

In virtually all cases, HUD approves federally funded public housing demolition and redevelopment projects without preparing an EIS. HUD is among the agencies whose decrease in EIS preparation has been especially dramatic. In 1979, HUD prepared a total of 170 EISs,[12] but that number has plummeted by 99%. Since 1998, HUD has prepared between zero and five EISs annually, and in 2006 HUD prepared just two EISs in the entire agency.[13] By contrast, HUD was one of five agencies that produced 80% of the 50,000 EA's produced in 1993. *CEQ Effectiveness Study*, *supra* note 4, at 19. The implication is that not a single HUD-approved project, except perhaps one or two each year, will have a "significant" effect on the environment – a position that is difficult to comprehend, and which is a central question of the petition.

1. HUD Has Uniformly Avoided Preparing EISs for HOPE VI Projects, Even Though the Program is Designed to "Significantly" Affect the Environment.

Implementation of the HUD program at issue in this case – the "HOPE VI" Program ("Homeownership and Opportunity for People Everywhere") – demonstrates that HUD rarely ever prepares an EIS to satisfy NEPA, even though the whole purpose and philosophy of the program is

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[11] *CEQ Effectiveness Study*, *supra* note 4, at 20.

[12] *See* CEQ REPORT, *supra* note 6, at 534.

[13] *See* CEQ http://ceq.eh.doc.gov/nepa/-Calendar_Year_2006_Filed_EISs.pdf.

designed to "significantly affect[] the quality of the human environment," 42 U.S.C. § 4332(2)(C). Although the program was initiated through Congressional appropriations starting in 1992, Congress codified the HOPE VI program in 1999. *Id.* § 1437v. The program's purpose is to create economic incentives for private developers through grants to local housing authorities to demolish, rehabilitate, reconfigure, or replace "severely distressed public housing projects." *Id.* § 1437v(a)(1). The intent of the program is to disperse concentrated urban poverty by relocating public housing to "non-poverty" neighborhoods and promoting mixed-income communities.[14]

The types of projects proposed by HOPE VI are ones that by their very nature are likely to have "significant" impacts on the environment, including historic resources. The HOPE VI program is designed in part to "benefit the surrounding neighborhood and even the larger city and region. Supporters argue that HOPE VI's ability to *transform entire neighborhoods* is one of the program's most revolutionary opportunities and significant outcomes."[15]

The significant unaddressed impacts of HOPE VI projects have been exacerbated by HUD's inability to adequately oversee the grants, including the review of EAs prepared by local housing authorities.[16]

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[14] *See* http://www.hud.gov/offices/pih/programs/ph/hope6/about/#1.

[15] Susan J. Popkin, et al., The Urban Institute & The Brookings Institution, *A Decade of HOPE VI: Research Findings & Policy Challenges*, at 41 (May 2004) (emphasis added), *available at* http://www.urban.org/-uploadedPDF/411002_HOPEVI.pdf.

[16] U.S. General Accounting Office, *Report to the Ranking Minority Member, Subcomm. on Housing & Transp., Comm. on Banking, Housing, & Urban Affairs, U.S. Senate – Public Housing: HUD's Oversight of HOPE VI Sites Needs to Be More Consistent*, at 26 (May 2003) ("According to various reports and HUD field staff, the limited number of grant managers, a shortage of field staff, and confusion about the role of field offices have diminished the agency's ability to oversee HOPE VI grants.").

The two largest categories of HOPE VI grants are "Demolition" and "Revitalization," which funds the capital costs of major rehabilitation, new construction, and other physical improvements; demolition of severely distressed public housing; acquisitions of sites for off-site construction; and community and support service programs for residents, including those relocated as a result of revitalization efforts.[17] From 1993 to 2006, the HOPE VI program awarded 236 "Revitalization" grants nationally (including the $25 million grant involved in this case), for a total of $5.9 billion.[18] And from 1996 to 2003, HOPE VI awarded 287 "Demolition" grants, for a total of over $395 million.[19] Yet from 1998-2006, HUD prepared and completed a total of only 21 EISs, for all projects and programs funded by the entire agency.[20] One can deduce from these numbers that very few – if any – of HUD's HOPE VI projects has ever been the subject of an EIS.

2. In New Orleans Alone, HUD is Currently Proposing to Demolish Four Major Historic Public Housing Projects Similar to St. Thomas, Without Preparing an EIS.

In addition to the national implications of this case, the issues raised in the petition will have a direct bearing on HUD's ongoing activities in the Gulf Coast in particular. For example, HUD is currently proposing to demolish four more major historic public housing complexes in New Orleans, all of which are either listed or eligible for listing on the National Register.[21] A total of about 5,000 residential

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[17] *See* http://www.hud.gov/offices/pih/programs/ph/hope6/about/#3.

[18] *See* http://www.hud.gov/offices/pih/programs/ph/hope6/about/#5.

[19] *Id.*

[20] *See* http://www.nepa.gov/nepa/nepanet.htm.

[21] *See* http://www.hano.org/announcement.htm (Section 106 Consultation).

units are proposed for demolition – without preparation of an EIS – and the majority of the new housing units will be mixed-income and market rate.[22] While these massive projects will be using funding sources other than HOPE VI, HUD's avoidance of the EIS requirement is just as inappropriate as it is in the instant case.

II. COMPLIANCE WITH NEPA IS CRUCIAL FOR HISTORIC PRESERVATION

NEPA plays a crucial role in the protection and preservation of our nation's historic resources. The Act clearly recognizes as part of NEPA's purpose the intent to "*preserve important historic, cultural*, and natural aspects of our national heritage," and to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," 42 U.S.C. §§ 4331(b)(4), (b)(2) (emphasis added). The CEQ regulations further emphasize the inclusion of historic and cultural resources as an identified environmental value. *See* 40 C.F.R. §§ 1508.8(b), 1508.27(b)(8).[23] Thus, avoidance of the EIS requirement can lead to greater effects on historic resources, as well as impact the Section 106 process under the NHPA.

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[22] The former tenants of these four housing projects have filed suit against HUD to challenge the demolition plans. *See Anderson v. Jackson*, 2007 WL 458232 (E.D. La. Feb. 6, 2007) (upholding a cause of action under § 3608 of the Fair Housing Act and the Due Process Clause).

[23] The CEQ regulations define "effects" or "impacts" to the environment to include "ecological . . . , aesthetic, *historic, cultural*, economic, social, or health" effects. 40 C.F.R. § 1508.8(b) (emphasis added). In defining "significantly," the regulations require consideration of "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources," as one of ten factors to determine whether the "intensity" or "severity" of an action's effects are significant. *Id.* § 1508.27(b)(8).

A. Avoidance of NEPA's EIS Requirement Undermines the NHPA.

The close relationship between NEPA and NHPA increases the possibility that misuse of NEPA's EA process can also negatively impact the application and analysis of NHPA. In turn, potential adverse effects to historic properties will likely be given little or cursory examination.

In 1966, Congress enacted the NHPA in recognition that "historic properties significant to the Nation's heritage are being lost or substantially altered," and that "the preservation of this irreplaceable heritage is in the public interest," 16 U.S.C. §§ 470(b)(3), 470(b)(4).[24] Section 106 of the NHPA is aimed at ensuring that federal agencies "take into account" the potential effects of their actions on historic properties. *Id.* § 470f.

Like NEPA, Section 106 of the NHPA is a strictly procedural requirement, which federal agencies must follow prior to approving any proposed action, but which often has the effect of encouraging agencies voluntarily to modify their programs and projects in a substantive way that will reduce harm to historic resources.[25] The fundamental goal of the Section 106 consultation process is to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a). Those measures are then typically reflected in a Memorandum of Agreement (MOA), which is binding and enforceable. *See* 16 U.S.C. § 470h-2(*l*); 36 C.F.R. § 800.6(c).

Both NEPA and the NHPA direct federal agencies to examine how a proposed action will impact environmental values, including historic resources, and "both are designed

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[25] *See Vieux Carré Property Owners, Residents & Assoc's, Inc. v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991) ("There is . . . a broad range of remedies that could conceivably emerge from NHPA review.").

to insure that the agency 'stop, look, and listen' before moving ahead." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1981). "While the [NHPA] may seem to be no more than a 'command to consider,' . . . the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less, Situated in Clay County, Miss.*, 639 F.2d 299, 302 (5th Cir. 1981).

Even though NEPA and the NHPA often apply together to a proposed federal action, "compliance with the NHPA . . . does not assure compliance with NEPA. Each mandates separate and distinct procedures, both of which must be complied with when historic buildings are affected." *Preservation Coalition, Inc.*, 667 F.2d at 859 (citing *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 444-45 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976)).[26] Thus, completion of the Section 106 process, even through the execution of an "MOA" with the ACHP,[27] as was done in this case, "does not relieve a federal agency of the duty of complying with the [EIS] requirement 'to the fullest extent possible.'" *Id.* at 859 (quoting 42 U.S.C. § 4332).

1. Overuse of EAs Can Harm the Public's Ability to Participate in the Section 106 Review Process.

The preparation of an EIS furthers NEPA's "action-forcing" procedures in two ways.[28] It ensures that the agency's decision will be informed by awareness and consideration of the environmental consequences, and it also "guarantees that the relevant information will be made

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[26] Conversely, a discussion of historic resources in an EIS is not sufficient for compliance with NHPA Section 106. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL HISTORIC PRESERVATION CASE LAW, 1966-1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 41. *See also* 16 U.S.C. § 470h-2(i).

[27] *See* 36 C.F.R. § 800.6(c).

[28] *Robertson*, 490 U.S. at 348-49 (citing 115 Cong. Rec. 40,416 (1969) (remarks of Sen. Jackson)).

available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349.

A key component of that "larger audience," *id.*, which an EIS helps to inform, includes the interested parties who participate in the consultation process required under Section 106 of the NHPA, 16 U.S.C. § 470f; *see also* 36 C.F.R. § 800.2.[29] Thus the failure to prepare an EIS – and confusion about whether and when an EIS may be required – has important implications for the Section 106 review process, and can be very prejudicial to its effectiveness.

The views of the public are considered "essential to informed Federal decisionmaking in the section 106 process." 36 C.F.R. § 800.2(d)(3). Yet, in contrast to the public notice and comment requirements for an EIS,[30] the Section 106 regulations do not include specific requirements regarding the timing or content of a public notice.[31] Instead, the regulations encourage agencies to use their NEPA procedures for the public participation component of Section 106 review. *See id.*

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[29] These parties include the ACHP; the State and/or Tribal Historic Preservation Officer (SHPO/THPO); Indian Tribes; local governments; applicants for federal assistance, permits, licenses, or approvals; parties with a legal or economic relation to the undertaking or affected properties; and those concerned about the project's effects on historic properties. 36 C.F.R. § 800.2(b)-(c).

[30] CEQ regulations establish public notice requirements and timeframes for commenting on EISs, requiring publication in the Federal Register and established minimum time periods for commenting to the authorizing agency. *See* 40 C.F.R. §§ 1506.6, 1506.10.

[31] The Section 106 regulations state that "agency officials shall seek and consider the views of the public *in a manner that reflects the nature and complexity of the undertaking* and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking." 36 C.F.R. § 800.2(d)(1) (emphasis added). There is little guidance as to how or when agencies must provide such notice to the public.

However, unless the agency prepares an EIS, those NEPA procedures often require virtually nothing in terms of any meaningful opportunity for public involvement.[32] The public is less likely to know about an action at all when an EA is prepared, and as a result the agency remains largely unaccountable.[33] The CEQ itself has noted that EAs substantially limit public involvement, and "can create mistrust and add costs and time as projects are delayed by ensuing controversy and legal challenges." *CEQ Effectiveness Study, supra* note 6, at 19.

Since the Section 106 regulations rely directly on agency NEPA procedures for public involvement, e.g., 36 C.F.R. § 800.2(d)(3), the lack of meaningful public notice and comment requirements for EAs will often severely limit the public's opportunity for an effective role under Section 106. Thus, when agencies give NEPA short shrift by avoiding the preparation of EISs, public participation in the Section 106 process suffers.

This case is a classic example of how the "lowest common denominator" of EA public involvement procedures fatally infected the Section 106 consultation process. On Christmas Eve, 2002, HUD placed a legal notice in the local newspaper that the EA was available for comment until January 8, 2003. However, the consulting parties under Section 106 were not notified until more than two weeks later, on a Friday afternoon, just three business days before an extended comment deadline of January 15, 2003. When the National Trust requested that a portion of the EA be made available electronically or by fax – specifically, the

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[32] *See* 40 C.F.R. §§ 1501.3, 1503.1, 1506.6; *Sierra Club v. Marsh*, 769 F.2d at 875 (citing *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983)). *CEQ Effectiveness Study, supra* note 6, at 19-20 (*e.g.*, "little or no public involvement").

[33] When preparing an EA, the agency is only required to "involve environmental agencies, applicants, and the public, *to the extent practicable*." 40 C.F.R. § 1501.4(b) (emphasis added).

Draft MOA prepared under Section 106, and information regarding effects on historic properties – the agency flatly refused, stating that the six-volume EA was only available for in-person viewing in New Orleans during regular business hours. Clearly, HUD's actions thwarted the opportunity for meaningful public comment.

2. Reliance on EA Documentation Can Skew Agency Determinations under Section 106.

In addition to the reliance on agency NEPA procedures in the Section 106 regulations, Federal agencies also frequently rely on their NEPA documentation for purposes of conducting the NHPA's Section 106 review. Indeed, the Section 106 regulations provide a specific procedure for coordination between NEPA and Section 106 review, by setting out criteria that the NEPA documentation must satisfy in order to be eligible for the dual purpose of compliance with both NEPA and Section 106 of the NHPA. *See* 36 C.F.R. § 800.8(c)(1)(i)-(v). If the agency's NEPA documentation is inadequate or cursory, Section 106 consideration is likely to be inadequate as well. An EA is likely subject to "less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives." *CEQ Effectiveness Study, supra* note 6, at 20.

3. Failure to Prepare an EIS Reduces the Scope of Analysis for Impacts on Historic Resources.

NEPA applies to a broader range of protected resources than Section 106 of the NHPA, and addresses a broader range of environmental impacts as well. Thus, neither the agency nor the public can rely on Section 106 to compensate for the failure to prepare an EIS when it comes to evaluating impacts on historic and cultural resources.

For example, Section 106 is only applicable to properties

that are listed or eligible for listing on the National Register of Historic Places. 16 U.S.C. §§ 470f, 470w(5); 36 C.F.R. § 800.16(*l*). NEPA, by contrast, also applies to properties of historic, cultural, and/or architectural significance that may not meet the strict qualifications for the National Register.[34] *See, e.g., Boston Waterfront Residents Ass'n, Inc. v. Romney*, 343 F. Supp. 89 (D. Mass. 1972) (NEPA applied even though buildings to be demolished were not listed on or determined eligible for the National Register). These may include historic properties designated as significant by state or local governments.

In addition, while Section 106 requires agencies to consider whether a particular project may lead to the demolition or neglect and deterioration of historic properties, 36 C.F.R. § 800.5(a)(2)(i), (vi), the kind of social and economic analysis called for under NEPA is often more suited to predicting these impacts.[35] For instance, the construction of big-box retail stores can lead to urban disinvestment in smaller businesses, which can translate directly into physical adverse effects on historic properties through reduced investments in maintenance, leading to deterioration.[36]

NEPA requires that EISs include an evaluation of impacts such as "growth inducing effects and other effects

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[34] *See* 40 C.F.R. §§ 1508.27(b)(3), (b)(8) (an agency must consider the "unique characteristics of the geographic area such as proximity to historical or cultural resources" and "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic places or may cause loss or destruction of significant scientific, cultural, or historical resources," as part of its assessment of intensity to determine whether an action will "significantly" affect the human environment).

[35] *See generally* 42 U.S.C. § 4332. In addition, the CEQ regulations require the study of effects that include "aesthetic, historic, cultural, economic, social, or health" impacts. 40 C.F.R. § 1508.8(b).

[36] *See generally* CONSTANCE E. BEAUMONT, HOW SUPERSTORE SPRAWL CAN HARM COMMUNITIES 1-19 (National Trust for Historic Preservation 1994).

related to induced changes in the pattern of land use, population density or growth rate." 40 C.F.R. § 1508.8(b).[37] This kind of analysis is directly relevant to assessing the potential for future speculative demolition, or neglect and deterioration, of historic properties resulting from an individual project.

In sum, a federal agency cannot simply assume that Section 106 review will cover all historic resources and all types of impacts. The agency will lose the opportunity for a broader look at how a proposed action may impact historic resources, if it attempts to bypass an EIS by straining to apply an EA.

B. Avoidance of NEPA's EIS Requirement Often Leads to Inadequate Consideration of Specially Designated Historic Resources.

At the heart of this case is the incompatibility of the St. Thomas HOPE VI redevelopment project with the unique historic character of New Orleans, which is one of the most significant and distinctive historic cities in the nation. New Orleans has a total of 110 National Register listings, including 28 National Register Historic Districts,[38] and 25 National Historic Landmarks (NHLs).[39] These resources, important to the historic fabric of New Orleans, represent scarce historic properties, which are increasingly susceptible to damage, destruction, or loss.

The Section 106 review for the St. Thomas project identified 12 National Register Historic Districts, two NHL

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[37] EISs must also include consideration of "[u]rban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures." 40 C.F.R. § 1502.16(g).

[38] *See* http://www.nationalregisterofhistoricplaces.com/LA/Orleans/-districts.html.

[39] *See* http://www.cr.nps.gov/nhl/designations/Lists/List07.pdf, at 34-35 (Apr. 2007).

Districts, and two individual NHLs as potentially affected by the project. *See* Appendix I to Petition for Certiorari. Indeed, the entire St. Thomas public housing development was itself historic (including more than 1500 residential units in 121 buildings); it was entirely within the Lower Garden District, which the NPS listed on the National Register in 1972, and the St. Thomas development was deemed as "contributing" to the significance of the historic district.

1. Importance of the *National Register of Historic Places*

When Congress enacted the NHPA in 1966, the Secretary of the Interior was authorized to expand and maintain the National Register of Historic Places to include "districts, sites, buildings, structures, and objects significant in American history architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(a)(1)(A).[40] Congress also gave the Secretary the authority to promulgate and administer regulations in order to set criteria and procedures for the National Register. *Id.* §§ 470a(a)(1)(A), 470a(a)(2).

The National Register regulations established standard criteria for eligibility, 36 C.F.R. § 60.4, and created the "Keeper" of the National Register. *Id.* § 60.3(f); *see also Moody Hill Farms Ltd. Part. v. United States Dep't of the Interior*, 205 F.3d 554, 558 (2d Cir. 1999).

The National Register plays an integral role in ensuring that our Nation's significant historic resources are preserved and protected for future generations. Although National Register listing is honorific in nature, it serves as a unifying

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[40] *See* http://www.cr.nps.gov/nr/research/index.htm. There are about 80,000 listings in the National Register of Historic Places. However, since many of these listings are historic districts, each of which includes a number of individual historic properties, the total number of properties included within the National Register is estimated at approximately 1.4 million. *Id.*

national standard for identifying and designating significant historic resources. Listing a property in the National Register does not prohibit its demolition or destruction. It should, however, merit consideration of the property under NEPA and Section 106 of the NHPA when a proposed federal action has the potential to adversely affect the property. In addition, the National Register is used by many state and local governments as a planning tool for identifying and protecting significant resources. *See* 36 C.F.R. § 60.2(a).

2. Importance of *National Historic Landmarks*

National Historic Landmarks represent the "cream of the crop" of our nation's heritage. In fact, fewer than 2,500 NHLs have been designated nationwide.[41] These highly significant properties are designated by the Secretary of the Interior, and represent historic "properties of exceptional value to the nation as a whole rather than to a particular State or locality." 36 C.F.R. § 65.2(a). As the National Park Service emphasized in this case, "[NHLs] are considered to be the most important historic properties in the Unites States. They are national treasures worthy of extra caution."[42]

Under Section 110(f) of the NHPA, which was added to the Act in 1980,[43] federal agencies have a substantially higher responsibility for protecting NHLs than they do for historic properties generally. Section 110(f) specifically requires that "[p]rior to the approval of any Federal undertaking which may directly and adversely affect any

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[41] *See* http://www.cr.nps.gov/nhl/-designations/Lists/LIST07.pdf; http://www.cr.nps.gov/nhl.

[42] Petition for Writ of Certiorari at 92a (letter from Paul B. Hartwig, Associate Regional Director, National Park Service, to David G. Blick, Historic Preservation Specialist, HUD (Nov. 18, 2002)).

[43] *See* H.R. Rep. No. 1457, 96th Cong., 2d Sess. 38, *reprinted in* 1980 U.S.C.C.A.N. 6378, 6401 (Section 110(f) establishes a "higher standard of care to be exercised by Federal agencies" for projects that may affect NHLs).

[NHL], the head of the responsible Federal agency *shall, to the maximum extent possible*, undertake such planning and actions as may be necessary to *minimize harm to such landmark*." 16 U.S.C. § 470h-2(f) (emphasis added).

Satisfaction of the procedural requirements of Section 106 of the NHPA is not enough to meet the higher threshold required by Section 110(f) when NHL properties may be harmed by a proposed action. *See Coalition Against a Raised Expressway (CARE) v. Dole*, 17 Envtl. L. Rep. 20,466, 20,472 (S.D. Ala. Oct. 20, 1986), *aff'd*, 835 F.2d 803 (11th Cir. 1988); *see also* 36 C.F.R. § 800.10. However, the Section 106 process includes special provisions applicable to NHLs. *See, e.g.*, 36 C.F.R. § 800.10(c).

In this case, the St. Thomas development is immediately adjacent to two NHL churches (St. Alphonsus Church, and Sts. Mary's Assumption Church), and in close proximity to the NHL Garden District. *See* Petition for Writ of Certiorari, at App. 35a and App. I (map). Yet, despite the requirement in Section 110(f) to minimize harm to these properties "to the maximum extent possible," HUD did nothing to address the potential for harm to these highly significant resources. HUD's failure to consider these significant impacts was not only legally erroneous under NEPA, but it also prevented HUD from meeting its higher obligations under Section 110(f) of the NHPA.

CONCLUSION

For the foregoing reasons, this Court should grant petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, *et al.*,

Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PROFESSORS OF ENVIRONMENTAL, LAND USE PLANNING, AND ADMINISTRATIVE LAW JAMES SALZMAN, DAVID CALLIES, ALYSON FLOURNOY, ROBERT GLICKSMAN, THOMAS MCGARITY, CLIFF RECHTSCHAFFEN, ROBERT R.M. VERCHICK AND DAVID VLADECK AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THROUGH AN EIS, NEPA MANDATES INFORMED DECISION MAKING AND PUBLIC PARTICIPATION 5

II. THE FIFTH CIRCUIT'S DECISION HEIGHTENS THE CONFLICT AMONG THE CIRCUITS AND UNDERMINES NEPA'S VITAL FUNCTIONS 6

A. The First, Second, Ninth, Eleventh, and D.C. Circuits Require EISs Whenever There Is a "Substantial Possibility" of a Significant Environmental Impact 7

B. In Contrast, the Third, Fifth, and Tenth Circuits Require an EIS Only When a Significant Environmental Impact Is Nearly Certain 9

III. THE FIFTH CIRCUIT'S STANDARD, ALONG WITH THOSE OF THE THIRD AND TENTH CIRCUITS, UNDERMINES NEPA'S MANDATE OF INFORMED DECISION MAKING AND PUBLIC PARTICIPATION 10

A. Through the EIS Requirement, NEPA Promises Informed Decision Making and Public Participation 10

B. The Fifth Circuit Misread This Court's Decision in *Robertson* and Undermined NEPA's Vital Functions 12

TABLE OF CONTENTS – Continued

Page

C. Substituting an EA for an EIS Defeats NEPA's Mandate Because an EA Demands Less Analysis and Requires Little or No Public Participation 16

1. EAs Demand Less Analysis and Require Little or No Public Participation 17

2. Lengthy EAs that Identify and Dismiss Multiple Concerns Threaten to Undercut the EIS process and Are Thus Highly Suspect 18

3. Because HUD's Lengthy EA and FONSI Undercut NEPA Goals, It Should Be Rejected in Favor of a Proper EIS 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426 (10th Cir. 1996) 9

Anderson v. Evans, 371 F.3d 475 (9th Cir. 2002) 7, 8

City of Shoreacres v. Waterworth, 420 F.3d 440 (5th Cir. 2005) 14

City of Waltham v. United States Postal Serv., 11 F.3d 235 (1st Cir. 1993) 7

Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004) 10, 11, 12

Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996) 7

Grand Canyon Trust v. FAA, 290 F.3d 339 (D.C. Cir. 2002) 8, 9

Louisiana Crawfish Producers Ass'n v. Rowan, 463 F.3d 352 (5th Cir. 2006) 9

Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989) 3, 6

Massachusetts v. E.P.A., No. 05-1120, 2007 U.S. LEXIS 3785 (Apr. 2, 2007) 13

National Audubon Society v. Hoffman, 132 F.3d 7 (2d Cir. 1997) 7

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) ..... *passim*

Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) 18, 19

Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168 (3d Cir. 2000) 9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER REGULATIONS

40 C.F.R. § 1502.7 18

42 U.S.C. § 4331 12

42 U.S.C. § 4332(1) 5, 13

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50 Fed. Reg. 32237 (1985) 15

OTHER AUTHORITIES

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James Rasband, James Salzman & Mark Squillace, *Natural Resources Law and Policy* (2004) 6

TABLE OF AUTHORITIES – Continued

Page

Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There are Too Many Trees*, 17 Tul. Envtl. L.J. 177 (2003) 6, 7

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Merriam-Webster Eleventh Collegiate Dictionary (2003) 14

Michael Gerrard, *Environmental Law Practice Guide* (2006) 6, 17

Richard M. Nixon, *Statement about the National Environmental Policy Act of 1969* (Jan. 1, 1970) 5

Robert G. Dreher, *NEPA Under Siege – The Political Assault on the National Environmental Policy Act*, Geo. Envtl. L. & Pol'y Inst. (2005) 6, 17

INTEREST OF *AMICI CURIAE*

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[1] Both parties have consented to the submission of this brief in letters filed with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part. The Program in Public Law at Duke University School of Law paid for the printing and submission of this brief.

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SUMMARY OF ARGUMENT

The Circuit Courts have applied different standards in reviewing a federal agency's decision not to prepare an EIS. The "arbitrary and capricious" standard as announced by this Court in *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989) has failed to create uniformity because the circuits have diverged in the application of this standard. The First, Second, Ninth, Eleventh, and D.C. Circuits uniformly review an agency's decision not to prepare an

Environmental Impact Statement ("EIS") under a "substantial possibility" standard. By permitting an agency to avoid conducting a full environmental analysis even though adverse environmental effects are substantially likely, the standard of judicial review applied by the Fifth Circuit undermines NEPA's vital functions and fails to implement NEPA "to the greatest extent possible." In contrast, the Third, Fifth, and Tenth Circuits require EISs in a much narrower range of circumstances.

The standard of judicial review applied by the Fifth Circuit undermines NEPA's vital functions and fails to implement NEPA "to the greatest extent possible." Specifically, the Fifth Circuit allowed the Department of Housing and Urban Development ("HUD") to transgress its legal boundaries, undercutting NEPA's mandate of informed decision making and public participation, because it misread this Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). That case did not, as the Fifth Circuit construed it, rule that all environmental concerns not nearly certain are perforce "highly speculative." Rather, it noted that even remote and poorly understood concerns could be "reasonably foreseeable" and therefore deserving of the EIS process.

By dispensing with an EIS in favor of a less demanding Environmental Assessment ("EA"), HUD was able to sidestep NEPA's mandate of informed analysis and meaningful public participation, since EAs require less analysis and little or no public participation. Under such circumstances, the Fifth Circuit's more deferential standard toward EAs should be reversed to comport with this Court's decision in *Robertson*, the majority of federal circuits, and the policy objectives of NEPA.

ARGUMENT

I. THROUGH AN EIS, NEPA MANDATES INFORMED DECISION MAKING AND PUBLIC PARTICIPATION.

The National Environmental Policy Act ("NEPA") establishes a national policy designed, in the words of President Nixon, to "regain a productive harmony between man and nature." Richard M. Nixon, *Statement about the National Environmental Policy Act of 1969* (Jan. 1, 1970). The act sets out three visionary tasks. It commits the nation to a long-range mission of broad and uniform environmental policy. It directs federal agencies to prepare an EIS on all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). And it establishes broad channels of public participation to help improve proposed federal actions.

The centerpiece of the act is the EIS. Through the process of examining potential environmental harms and evaluating alternatives to proposed action, agencies further the act's long-range mission of informed decision making. By requiring multiple opportunities for interagency communication and public participation throughout the EIS process, the EIS requirement similarly realizes NEPA's goal of promoting public deliberation and enhancing the democratic process. Congress knew that government actors might be reluctant to change their methods and incorporate environmental concerns into their decision making; thus Congress expressly mandated that "to the fullest extent possible," the laws of the United States be interpreted and administered in accordance with NEPA's policies. 42 U.S.C. § 4332(1).

A trailblazer at the time of enactment, NEPA's precautionary, "look before you leap" attitude is now a foundation of environmental policy in the United States and around

the world. Its directive to consider potential environmental impacts and feasible government alternatives has "unquestionably improved the quality of federal agency decision-making" in environmental terms, minimizing the risks of dangerous emissions, saving billions of dollars in inefficient construction plans, and perhaps helping to provide essential habitat for the recently rediscovered Ivory-billed woodpecker. Robert G. Dreher, *NEPA under Siege, The Political Assault on the National Environmental Policy Act* 4-7 (2005); Council on Envtl. Quality, *The National Environmental Policy Act – A Study of Its Effectiveness After Twenty-Five Years* 8, 18 (Jan. 1997), *available at* <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>. NEPA has proved so attractive that similar laws now exist "in the statute books of 19 states and over 130 nations throughout the world." James Rasband, James Salzman & Mark Squillace, *Natural Resources Law and Policy* 253 (2004).

II. THE FIFTH CIRCUIT'S DECISION HEIGHTENS THE CONFLICT AMONG THE CIRCUITS AND UNDERMINES NEPA'S VITAL FUNCTIONS.

The Circuit Courts have applied different standards in reviewing a federal agency's decision not to prepare an EIS. The "arbitrary and capricious" standard as announced by this Court in *Marsh* has failed to create uniformity because the circuits have diverged in the application of this standard. This is widely recognized by practicing lawyers. Indeed the Environmental Law Practice Guide plainly states that "[the] plaintiff's burden of proof in showing that an agency's action significantly affects the quality of the human environment differs among the various circuits." 1 Michael Gerrard, *Environmental Law Practice Guide* § 1.11[5] (2006); *see also* Korey

A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There are Too Many Trees*, 17 Tul. Envtl. L.J. 177, 198 (2003) (confusion among the circuits "raises the specter of becoming hopelessly mired in multiple meanings of a single term.").

A. The First, Second, Ninth, Eleventh, and D.C. Circuits Require EISs Whenever There Is a "Substantial Possibility" of a Significant Environmental Impact.

The First, Second, Ninth, Eleventh, and D.C. Circuits uniformly review an agency's decision not to prepare an EIS under a "substantial possibility" standard. Under this standard, the agency must conduct a thorough investigation into a project's *potential* effects before concluding that no EIS is needed. *See City of Waltham v. United States Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993) (an EIS would be required if there was "a substantial possibility that the [Postal Service's] project could significantly affect the quality of the human environment." (internal quotation marks omitted)); *National Audubon Society v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997) (a challenger to a finding of non-significance need "show only that there is a substantial possibility that the action may have a significant impact on the environment"); *Anderson v. Evans*, 371 F.3d 475, 489-90 (9th Cir. 2002) ("the possible impact on the whale population ... [was] sufficiently uncertain and controversial to require the full EIS protocol."); *Fund for Animals v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996) ("the purpose of an [Environmental Assessment] is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement" (quoting *River Road Alliance, Inc., v. Corps of Eng'rs of U.S. Army*,

764 F.2d 445, 449 (7th Cir. 1985)); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002) (Federal Aviation Administration must "fully assess the possible environmental consequences of activities which have the potential for disturbing the environment." (internal quotation marks and alterations omitted)).

In the Ninth Circuit case, *Anderson*, for example, the federal government approved a quota for whale hunting by the Makah Indian Tribe. *Anderson*, 371 F.3d at 480. In reversing the government's decision not to prepare an EIS, the court of appeals held that "the plaintiffs need not demonstrate that significant effects will occur." *Id.* at 488. Instead, a showing of "substantial questions whether a project may have a significant effect on the environment" was sufficient to require preparation of an EIS. *Id.* (internal quotation marks omitted). Indeed, it was the very uncertainty of the impacts that convinced the court of the need for an EIS. *See id.* at 489-90 ("the possible impact on the whale population . . . [was] sufficiently uncertain and controversial to require the full EIS protocol."). The federal government thus erred in not issuing an EIS when "[there was] at least a substantial question whether killing five whales . . . could have a significant impact on the environment." *Id.* at 490.

Similarly, the D.C. Circuit also requires an agency to review possible, rather than likely or certain, environmental effects. In *Grand Canyon Trust*, the Federal Aviation Administration decided not to issue an EIS for the construction of a replacement airport near Zion National Park. *Grand Canyon Trust*, 290 F.3d at 339. Holding that an agency must "fully assess the possible environmental consequences of activities which have the potential for disturbing the environment," the court of appeals remanded the case. *Id.* at 342 (internal quotation marks and alterations omitted). The court held that the EA could

not focus solely on the incremental impacts of the project; it must also address the potential cumulative impacts because the replacement airport, in connection with the noise impacts from other sources, could potentially create significant impacts on the Park. *See id.* at 346.

B. In Contrast, the Third, Fifth, and Tenth Circuits Require an EIS Only When a Significant Environmental Impact Is Nearly Certain.

In contrast to the circuits discussed above, the Third, Fifth, and Tenth Circuits require EISs in a much narrower range of circumstances. Indeed, a challenger to a finding of non-significance must show that significant environmental impacts are nearly certain in order to demonstrate the need for an EIS. *See Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000) (upholding the Department of Housing and Urban Development's decision to ignore the cumulative effects because it was "not at all certain that the proposed 'mega' entertainment complex or any of the projects included in the planning documents [would] ever be completed."); *Louisiana Crawfish Producers Ass'n v. Rowan*, 463 F.3d 352, 358 (5th Cir. 2006) (requiring evidence that a potentially harmful project be "formulated"); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 431 (10th Cir. 1996) (Federal Aviation Administration's failure to analyze extensively the remaining components of a master plan was not inappropriate because "[u]pgrading Runway 3-21 does not *necessarily* signal a commitment to proceed with the rest of the Master Plan") (emphasis added).

Thus, the Third Circuit allows federal agencies not to prepare an EIS despite the existence of potentially significant effects on the quality of the human environment. In

Soc'y Hill Towers, for example, HUD approved a grant for the construction of a hotel and parking garage in downtown Philadelphia without issuing an EIS. *See Soc'y Hill Towers*, 210 F.3d at 172-73. In deciding that an EIS was unnecessary, HUD did not consider the cumulative effects that would result in connection with other proposed constructions in the area, including the building of a "mega" entertainment complex. *See id.* at 182. Because it was "not at all certain that the proposed 'mega' entertainment complex or any of the projects included in the planning documents [would] ever be completed," *id.* (emphasis added), the court upheld HUD's decision to disregard the cumulative impact regarding the other proposed projects.

III. THE FIFTH CIRCUIT'S STANDARD, ALONG WITH THOSE OF THE THIRD AND TENTH CIRCUITS, UNDERMINES NEPA'S MANDATE OF INFORMED DECISION MAKING AND PUBLIC PARTICIPATION.

By permitting an agency to avoid conducting a full environmental analysis even though adverse environmental effects are substantially likely, the standard of judicial review applied by the Fifth Circuit undermines NEPA's vital functions and fails to implement NEPA "to the greatest extent possible."

A. Through the EIS Requirement, NEPA Promises Informed Decision Making and Public Participation.

The EIS requirement serves both a "decision making" role and a more public, "informational" role. *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 768 (2004). In the decision making role, the EIS requirement "'ensures that the agency, in reaching its decision will have

available, and will carefully consider detailed information concerning significant environmental impacts.'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). This consideration is both searching and, to some degree, speculative. Thus, as the Council on Environmental Quality ("CEQ") put it on the statute's twenty-fifth anniversary, the success of NEPA follows from its insistence that agencies "take a hard look" at even "the potential environmental consequences of their actions." Council on Envtl. Quality, *supra*, at iii.

Such precaution is consistent with the act's history. Lawmakers at the time of NEPA's passage argued that in contrast to past practices, where environmental factors had "frequently been ignored and omitted from consideration in the early planning stages" a "vital requisite" of environmental management under NEPA would be broad evaluation of the "full environmental impacts and the full costs – social, economic, and environmental – of Federal actions." 115 Cong. Rec. 40415, 40419 (Sen. Henry Jackson). Where conflicts arose, Senator Henry Jackson argued that agencies should "err on the side of environmental protection." Matthew J. Lindstrom & Zachary A. Smith, *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference & Executive Neglect* 78 (2001). Necessarily, this new kind of decision making would require *new* information gathering to supplement present knowledge. As Senator Henry Jackson suggested decades ago, "the inadequacy of present knowledge" was, in fact, the major problem – manifesting itself in "haphazard urban and suburban growth," "congestion," and conditions that "detract from man's social and psychological well-being." 115 Cong. Rec. 29066, 29067. Ironically, nearly forty years later, these ills are the same ones that the Fifth Circuit now contends are beyond the reach of NEPA's EIS requirement.

In its second role, the EIS requirement "'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'" *Public Citizen,* 541 U.S. at 768 (quoting *Robertson,* 490 U.S. at 349). Such information is vital, since "Congress recognizes that . . . each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331.

Public participation, which occurs mainly at the comment stage of an EIS, serves two functions. First, public participation enhances informed decision making by providing policy makers with important information from community members, local government, and surrounding businesses that often lead to improved projects and less damaging impacts on the environment. *See* Council on Envtl. Quality, *supra*, at 17. Second, public deliberation enhances democratic involvement, increasing "public knowledge of . . . environmental issues" and "providing agencies an extraordinary opportunity to respond to citizen needs and build trust in surrounding communities." *Id.* Together, these two functions emphasize that "[e]nvironmental problems are not just a government problem, they are a community problem." *Id.*

B. The Fifth Circuit Misread This Court's Decision in *Robertson* and Undermined NEPA's Vital Functions.

While HUD is entitled to judicial deference, there are limits. NEPA's commitment to information gathering, and public participation are hardwired into the statute. Congress also directs that "to the fullest extent possible," the laws of the United States, including the Administrative Procedure Act, be interpreted in accordance with NEPA's

policies. 42 U.S.C. § 4332(1). Nor should deference principles allow a federal agency to convert its broad judgment into a "roving license to ignore the statutory text." *Massachusetts v. E.P.A.*, ___ U.S. ___, 2007 WL 957332, *20 (2007) (reviewing EPA inaction under the Clean Air Act). The Fifth Circuit allowed HUD to transgress its legal boundaries, undercutting NEPA's objective, because it misread this Court's decision in *Robertson*.

The problem seems to arise from an apparent confusion over when a potential effect should be considered so speculative as to fall outside the bounds of what is "reasonably foreseeable," which is to say, outside the bounds of NEPA review. In the case at bar, the Fifth Circuit defined a "reasonably foreseeable" event as one that must be either very likely or actually planned. For instance, one of petitioners' (collectively, "Coliseum Square") most important challenges to the Finding of No Significant Impact ("FONSI") focused on HUD's refusal to consider the possible effects that a larger migration of national chain stores would have on the historical Lower Garden District. (*See* Pet. Brief at 8.) The concern was based in part on an economic study in HUD's own administrative record, which described the view that Wal-Mart represented a "first wave" of brand-name stores as "understandable." Appellants' Fifth Circuit Record Excerpt 8. Nonetheless, the Fifth Circuit freed HUD from having to examine the role a Wal-Mart might play in drawing national chains to the area on the implausible grounds that such an effect was not "reasonably foreseeable." (Pet. App. 29a.) In rejecting as unforeseeable the influx of more chain stores, the appellate court did not claim that the concern was fanciful or even unsupported by evidence (recall the economic study), but that Coliseum Square had failed to provide "concrete" evidence that such commercial changes "will likely occur." *Id.* Without "concrete" evidence of a

"likely" occurrence, the court dismissed the feared result as a "'highly speculative harm'" – a term borrowed from this Court's decision in *Robertson*. *Id.* (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005), and citing *Robertson*, 490 U.S. at 356).

The Fifth Circuit's conclusion is mistaken in terms of both language and law. In terms of plain language, the court's conclusion is dubious. "Likely," when used as an adverb, means "probably," or "without much doubt." Merriam-Webster Eleventh Collegiate Dictionary 721, 989 (2003) (defining *likely* and *probably*). "Foreseeable," on the other hand, means "lying within the range for which forecasts are possible." *Id.* at 490. Because it is possible to make reasonable forecasts about events for which there may be some doubt, the two terms are not interchangeable. For the same reason, one cannot conclude that *any* event about which there is some doubt is perforce "highly speculative."[2]

In terms of controlling law, the appellate court's interpretation is also flawed: its references to "highly speculative harm" and the *Robertson* decision miss the point. The issue in *Robertson* was whether NEPA required an agency to make a "worst case analysis" in its EIS in situations where lack of information prevented the agency from making a reasoned assessment of the possible environmental impacts of a proposed ski resort. One concern of the plaintiffs challenging the EIS involved the effect that the project might have on the migration patterns of local mule deer. *Robertson*, 490 U.S. at 347. Because a lack of

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[2] Indeed, logic suggests that most members of a finite set of events about which there is some doubt – if evenly spaced – would *not* be "highly speculative," as that phrase suggests a location near the extreme end of the range.

information made it too costly or impossible to assess the problem in empirical, site-specific ways, plaintiffs argued the agency must conduct a "worst case analysis," a method once required by CEQ regulations in such cases, but which had since been replaced by an updated rule requiring a less aggressive form of analysis using "theoretical approaches and research methods." *Id.* at 354.

This Court refused plaintiffs' demand for a "worst case analysis," noting that such an analysis might "overemphasiz[e] highly speculative harms." But, significantly, this Court never once suggested that the mysteries of mule deer migration were out of bounds. Rather, Justice Stevens, writing for a unanimous Court, endorsed the "well-considered" replacement of the "worst case scenario" model with a more flexible model that continued to require agencies to "describe the consequences of a remote, but potentially severe impact." *Id.* at 354-55 (quoting 50 Fed. Reg. 32237 (1985)). Despite the lack of concrete, empirical information about mule deer migration, this Court never doubted that a possible disruption of deer migration was "reasonably foreseeable." *Id.* To put it another way: this Court acknowledged that a potential harm could be remote, poorly understood, *and* "reasonably foreseeable" all at the same time.[3]

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[3] To be sure, there is a limit to what is reasonably foreseeable, as suggested by this Court's refusal to re-impose the study of "highly speculative harms" under "worst case analysis." But such speculative "worst case" harms occupy a small universe of mostly scientific issues in which a causative link (between, say, an occurrence of cancer and exposure to a chemical) cannot be supported by any scientific data and is therefore "pure conjecture." *See* 50 Fed. Reg. 32234-01. In the case at bar, HUD does not claim that as a matter of scholarly research, there is no known link between the development of large box stores and the later appearance of smaller brand-name stores. On the contrary, the link seems more than plausible.

In the case at bar, Coliseum Square's concerns about the migration of brand-name stores is anything but remote or poorly understood. Yet the Fifth Circuit's mistaken interpretation of foreseeability turns even the most common-sense theory ("Super Wal-Marts attract more retailers") into something unacceptably exotic. To require EIS study only for harms about which there is "not much doubt" mocks the very idea of precaution. NEPA's "revolutionary" mandate for new analysis and public input rings hollow if applied only to events that are already basically understood. As the second stage of the development project goes forward, Coliseum Square is entitled to see more thoughtful examination and public participation than what the Fifth Circuit allowed.

C. Substituting an EA for an EIS Defeats NEPA's Mandate Because an EA Demands Less Analysis and Requires Little or No Public Participation.

By dispensing with an EIS in favor of a less demanding EA, HUD was able to sidestep NEPA's mandate of informed analysis and meaningful public participation. The EIS lies at the heart of the NEPA process. The EIS process requires an agency *to consider* and *to disclose to the public* a series of elements, from potential environmental impacts to alternatives to the proposed action. 42 U.S.C. § 4332(2)(C).

NEPA's inquiry "ensures that important effects will not be overlooked or underestimated, only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349 (internal quotes and citations omitted). The EIS "inevitably" propels federal agencies "to respond to the needs of environmental quality." *Id.* (same). At the same time, the EIS process provides

broad opportunities for members of the public, including individuals, businesses, and local governments to involve themselves in decisions affecting their interests. Dreher, *supra*, at 3. Through the EIS process, members of the public can help define the issues to be studied through "scoping meetings." They have the right to propose alternatives to proposed actions and to respond to "gaps and misunderstandings in the agency's analysis at the draft stage of the EIS." *Id.*

1. EAs Demand Less Analysis and Require Little or No Public Participation.

In contrast, the EA process is meant simply as a "brief analysis," to identify potentially significant environmental effects in need of further evaluation, not to resolve those issues. *See* Council on Envtl. Quality, *supra,* at 19. To facilitate a "first cut" at the issues, EAs are expected be short, generally not exceeding 45 pages. *See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18037 (1981) (recommending length of 10-15 pages); Gerrard, *supra*, at § 1.07 (noting that most EAs are 10-45 pages). Significantly, they are also relieved of the traditional requirements of public participation. For instance, notice of EA/FONSIs are not required to be published in the Federal Register; and the documents themselves need not be transmitted to CEQ, EPA, or any other supervisory agency. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 937 (2002).

2. Lengthy EAs that Identify and Dismiss Multiple Concerns Threaten to Undercut the EIS process and Are Thus Highly Suspect.

CEQ has warned for years against the practice of using the EA process as a rough substitute for an EIS. Lengthy EAs that purport to identify and then dismiss multiple environmental concerns through a FONSI, have, therefore, become highly suspect. For instance, CEQ guidelines warn that "[i]n most cases ... a lengthy EA indicates that an EIS is needed." 40 C.F.R. § 1502.7 (1984), *cited in Sierra Club v. Marsh,* 769 F.2d 868, 874 (1st Cir. 1985). More recently, CEQ has noted the concern that EA/FONSIs based on mitigation agreements (called "mitigated FONSIs") threaten to displace EIS protections and gut NEPA's central requirements. Such findings, it noted, "may be used simply to prevent the expense and time of the more in-depth analysis required by an EIS. The result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives, all of which are at the very core of NEPA's strengths." Council on Envtl. Quality, *supra,* at 20; *see also* Karkkainen, *supra*, at 937 (noting that mitigated FONSIs "largely escape review by the public, the press, Congress, the White House, the agencies," creating "the risk of unsupervised and unaccountable exercises of agency discretion").

Indeed, the First Circuit raised this very concern in *Sierra Club,* 769 F.2d 868, where it rejected the findings of a 350-page collection of EAs concluding that a proposed cargo port and causeway in Maine would not significantly affect the environment. Observing that an EA was not a "*substitute*" for an EIS, a unanimous court (per then-Judge Stephen Breyer) explained that the two documents "serve very different purposes." *Sierra Club*, 769 F.2d. at 875.

The court noted the functional concern that an EA, unlike an EIS, "does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project's other objectives, such as, for example, economic development." *Id.* It then raised the political concern that confusing EAs and EISs runs the risk that "neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects," noting that "those outside the agency have less opportunity to comment on an EA than on an EIS" and that "those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS." *Id.* (citations omitted).

3. Because HUD's Lengthy EA and FONSI Undercut NEPA Goals, It Should Be Rejected in Favor of a Proper EIS.

HUD's EA, which totaled more roughly 450 pages, dismissed myriad environmental concerns based on little or, in the case of the migration of name-brand stores, no data. It also relied on mitigation agreements to defuse important environmental issues. (Pet. App. at 30a.) While these facts do not render the EA/FONSI invalid per se, they match exactly the profile of a process that the CEQ, legal scholars, and the courts have found suspect – a process that avoids "the spirit and intent of NEPA" and that ducks the "in-depth analysis required by an EIS." *See* Council on Envtl. Quality, *supra,* at 20. HUD's actions effectively allowed it to truncate its analysis of alternatives and to tailor public participation to meet voluntary, but not required goals. As suggested by the court in *Sierra Club,* the process may also have suffered from more

relaxed interagency requirements and lower public credibility. Under such circumstances, the Fifth Circuit's more deferential standard toward EAs and FONSIs should be reversed to comport with this Court's decision in *Robertson*, the majority of federal circuits, and the policy objectives of NEPA.

CONCLUSION

For these reasons, this Court should grant Coliseum Square's petition for certiorari.

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